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No. 95-

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1995

ROBERT A. MCWHORTER,

Petitioner,

v.

GRIEVANCE ADMININSTRATOR,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF MICHIGAN

PETITION FOR WRIT OF CERTIORARI

Robert A. McWhorter
pro se
4611 W. Main St.
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(616) 382-2287

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the retroactive application by the Michigan Supreme Court of a new rule that a disbarred attorney must wait to apply for reinstatement for 5 years after his release from parole, only because he was placed on some form of penal supervision, rather than five years after his license was revoked, as specified by Michigan Court Rules MCR 9.123 and 9.124, when the attorney had already completed application, underwent public hearings and appeals, retrospectively changes the legal consequences of Petitioner's conviction, inflicts a greater punishment than the law annexed to the offense when it was committed and deprived Petitioner of a vested right in violation of the Ex Post Facto Clause of Article 1, Section 10 and the 5th Amendment of the United States Constitution?

II. Whether Petitioner, who established by "clear and convincing evidence" the criteria for reinstatement prescribed by Michigan Court Rules, was denied due process, in contravention of the 14th Amendment of the United States Constitution, when the Michigan Supreme Court, retroactively, held that Petitioner may not apply for reinstatement until "five years after his release from federal parole," in violation of its state constitution, state statutes and its own court rules while addressing issues, never briefed, never argued, and never heard, and with an appearance of impropriety, while withdrawing its certification of Petitioner's eligibility to seek reinstatement?

III. Whether the retroactive application to Petitioner of the new rule that a disbarred attorney must wait to apply for reinstatement until 5 years after his release from parole because he was placed on some form of penal supervision, rather than five years after his license was revoked, as specified by Michigan Court Rules, applying to Petitioner a different standard than applied to all other Michigan lawyers, similarly situated, under the same or similar circumstances with an apparent delegation of judicial authority to the prosecution, constitutes a denial of equal protection in contravention of the 14th Amendment of the United States Constitution?

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

Parties to the appeal in the Michigan Supreme Court were:

Robert A. McWhorter, Petitioner-Appellee (Petitioner)
Phillip J. Thomas, Grievance Administrator-Attorney Grievance Commission, Respondent-Appellant (Respondent)

TABLE OF CONTENTS

Question Presented for Review . . . . . .i, ii
List of Parties to the Proceedings in the Court Below iii
Table of Contents- Appendix v
Table of Authorities . . . . . vi, vii
Citations of Official and Unofficial Opinions and Orders Entered in the Case viii
Statement of Jurisdiction viii
Constitutional Provisions, Treaties, Statutes, Rules and Regulations Involved ix
Statement of Case. 1
Reasons for Granting Writ. 15
Conclusion 30
Appendix 1a-112a

TABLE OF CONTENTS - APPENDIX

A. Michigan S. Ct. Opinion and Order 1a-30a
B. Michigan S. Ct.
Order Denying Motion to Strike 31a
Leave to Appeal Granted 32a
Order Staying Reinstatement 33a, 34a
C. Order Denying Rehearing 35a
D. Attorney Discipline Board
Order of Remand 36a-38a
Order Denying Motion to
Enlarge Scope 39a-40a
Opinion 41a-57a
Order Modifying Hearing Panel's
Order of Reinstatement 58a-59a
E. Report of Tri County Hearing Panel
Opinions and Order 60a-71a
Attorney Discipipline Board
Conditional Order of Reinstatement . . . 72a-75a
Supplemental Report 76a-78a
F. U.S. Constitution
Article 1 Sec. 10 . . . . . .79a
5th Amendment 79a
14th Amendment 79a-80a
G. Michigan Constitution 81a
H. Michigan Statutes 82a-84a
I. Michigan Court Rules 85a-100a
J. Michigan General Court Rules of 1963 . . . 100a-112a

TABLE OF AUTHORITIES

Beazell v Ohio, 269 U.S. 167, 46 S. Ct. 68, 70 L. Ed. 216 (1925) 16

Bouie v Columbia, 387 US 347, 84 S.Ct. 1697, 12 L.Ed. 2d 894 (1964) 16

Cal. Dept. of Corrections v Morales, 514 U.S. __, 115 S. Ct. __, 131 L. Ed. 2d 588 (1995) 16

Calder v Bull, 3 Dall 386, 1 L. Ed. 648 (1798) . . 16

City of Celburne,TX. v Celburne Living Center, 473 US 432, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985) . . 28, 29

Farmers Bank of Concord v Dep't of Comm. Financial Inst. Bur., 77 Mich App 313, 258 NW2d 496 (1977) . . 23

Frost v Corp. Com. of Okla., 278 U.S. 515, 49 S.Ct. 235, 73 L.Ed. 483 (1929) 28

Galvan v Press, 347 US 522, 530, 74 S. Ct. 737, 742, 98 L. Ed. 911 (1954) 15

Grievance Administrator v August, 438 Mich 296 (1991) 8, 22

In Re Freedman, 406 Mich 256; 277 NW2d 635 (1979). .22

In Re Grimes, 414 Mich 483; 326 NW2d 380 (1982). . . 22

In Re Ruffalo, 390 US 544, 88 S.Ct. 1222, __ L. Ed.__, (1968) 16

Landgraf v USI Film Prods, __ US__ 114 S.Ct. 1522, 128 L. Ed. 2d 299 (1994) 17

Lindsey v Washington, 301 US 397, 57 S. Ct. 797, 81 L. Ed. 1182 (1937) 16

Marshall v Jerico, 446 US 238; 100 S. Ct. 1610, 64 L.Ed. 2d 812 (1980) 22

Massachusetts v Feeny, 442 US 256, 99 S. Ct. 2282, 60 L. Ed. 2d 870 (1979) 28

Matter of the Reinstatement Petition of Evan H. Callanan, Jr, 440 Mich 1207, 487 NW2d 750 (1992) 9, 26

Matthews v Eldridge, 424 US 319, 96 S.Ct 893, 47 L.Ed.2d 18 (1976) 26

McCleskey v Kemp, 481 U.S. 279, 107 S. Ct. 1756,
95 L. Ed. 2d 262 (1987) 28
Norvel v Illinois, 373 Mich 420, 83 S.Ct 1366;
10 L.Ed. 2d 456 (1963) 28
Parham v Cortese, 407 US 67, 92 S. Ct. 1983,
32 L. Ed 2d 556 (1972) 21
Poelman v Payne, 332 Mich 597; 52 NW2d 229 (1952).21
Rio Grand Irrigation & C. Co. v Guildersleeve,
174 US 1103, 44 L. Ed. 603 (1898) 16, 17, 19
Schware v Board of Bar Exam. of State of New Mexico,
353 US 232, 77 S. Ct. 752, 1 L. Ed 2d 796 (1957). 22,23
Springer v U.S., 102 US 586, 26 L. Ed. 253 (1880) . . 21
State Bar Grievance Admistrator v Estes, 390 Mich 585;
212 NW2d 903 (1973) 22
U.S. v Halper, 490 U.S. 435, 109 S. Ct. 1892,
104 L. Ed. 2d 487 (1989) 18,20
U.S. v Robel, 389 U.S. 258, 88 S.Ct. 419,
19 L.Ed. 2d 508 (1967) 24
Willner v Committee on Character and Fitness,
373 U.S. 96, 83 S.Ct. 1175, 10 L.Ed.2d 224 (1963) . . 25

CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE

The Opinion of the Michigan Supreme Court whose Opinion is herein sought to be reviewed, is reported at Reinstatement of Robert McWhorter, 449 Mich 130, 534 NW2d 480 (1995) and is reprinted in the separate Appendix A. Prior Opinions of the Michigan Supreme Court, reprinted in Appendix B are reported as follows: Order Staying Reinstatement and Denying Motion to Strike __ Mich __, 522 NW2d 631 (1995); Leave to Appeal Granted 447 Mich 1202, 525 NW2d 454 (1995); Order Denying Petitioner's Motion to Strike 448 Mich 869, 530 NW2d 751 (1995). The Order denying rehearing has not been reported. A copy of the Order appears in Appendix C. Additionally attached as Appendix D is the unpublished Opinion and Order of Reinstatement by the Attorney Discipline Board, May 20, 1994; and Appendix E, Opinion and Order of Reinstatement of Tri-County Hearing Panel #15, April 7, 1993; and Supplemental Report dated December 10, 1993.

STATEMENT OF JURISDICTION

The Opinion of the Michigan Supreme Court was entered July 5, 1995 and rehearing was denied September 19, 1995. Jurisdiction of this Court is invoked under 28 USC §1257 which permits review of a final judgment of the highest court of a state.

CONSTITUTIONAL PROVISIONS, TREATIES STATUTES, RULES AND REGULATIONS INVOLVED

United States Constitution

Article 1 §10
5th Amendment
14th Amendment

Michigan Constitution of 1963

Article 6 Section 1
Article 6 Section 5
Article 6 Section 28

Michigan Statutes

338.41, 338.42, 338.43, 338.44, 338.46
338.47

Michigan Court Rules

1.100, 1.101, 1.102, 1.103, 1.104, 1.105, 1.200
9.108, 9.109, 9.110, 9.111, 9.115, 9.118
9.122, 9.123, 9.124

Michigan General Court Rules 1963

958, 959, 960, 964, 967, 971, 972, 973

STATEMENT OF CASE

This is a case regarding an application for reinstatement to practice law. A case where the triers of fact found Petitioner's conduct, since the revocation of his license, to have been exemplary and above reproach and that Petitioner had established by clear and convincing evidence that he should be reinstated. However, he was denied reinstatement. The statement of the case is excerpted directly from the Michigan Court Rules, (Appd I and J), the findings of fact set forth in the opinions of the Michigan Attorney Discipline Board and its hearing panel, (Appd D and E) and the Opinion of the Michigan Supreme Court (Appd A).

Reinstatement Procedure

Michigan has unusual disciplinary and reinstatement procedures. Effective October 1, 1978, the Michigan Supreme Court created by court rule, an administrative procedure to supervise and discipline Michigan attorneys, including reinstatement. Amended, modified, and readopted in 1985, but substantially unchanged, the Court divided supervision and discipline into two arms: the Attorney Grievance Commission, the prosecutorial arm; and the Attorney Discipline Board, the adjudicative arm.
(Appd I and J)

The Attorney Discipline Board appoints three members to each hearing panel to hold public hearings, receive evidence and make written findings of fact under the rules governing practice and procedure in a nonjury civil action.

Review of a hearing panel order is by written appeal setting forth "the reasons and grounds upon which review is sought." The Attorney Discipline Board, on timely filing,

issues an order to show cause why the order of the hearing panel should not be affirmed.

On review, the Board determines whether or not the findings of the hearing panel have proper evidentiary support on the whole record. The Board, at the same time, possesses a measure of discretion with regard to its ultimate decision. (Appd p.44a)

Judicial review by the Michigan Supreme Court is by leave (Appd p.96a). Pursuant to Article 6 §28 of the Michigan Constitution of 1963, judicial review is whether the findings of the hearing panel and Attorney Discipline Board "are supported by competent, material and substantial evidence on the whole record." (Appd p.81a)

Petitioner is currently 56 years of age and was licensed to practice law in the State of Michigan in 1966. Effective February 24, 1981, Petitioner's license to practice law was revoked pursuant to two separate felony convictions. (Appd p.41a, 57a, 61a, 62a)

Under Michigan Court Rule MCR 9.123, (Appd p.97a-99a) an attorney whose license has been revoked for 5 years may apply for reinstatement. On April 1, 1992, Petitioner filed with the Michigan Supreme Court a petition for reinstatement with copies to the Attorney Grievance Commission and Attorney Discipline Board. Thereafter, the Attorney Grievance Commission conducted an investigation, submitted Petitioner's application for publication in the Michigan Bar Journal, and a public hearing was scheduled before a hearing panel.

Hearing Panel Proceedings

Public hearings were conducted before the panel on four separate days between August 12, 1992 and November 9, 1992. In the course of those hearings, Petitioner offered

17 witnesses in support of his reinstatement. Their testimony was strong and persuasive. These witnesses included:

1) The pastor and two members of Petitioner's church testified that petitioner has been an active member, participates in a number of church activities, particularly the "extended family" program, and that Petitioner has a reputation for honesty and trustworthiness, among the church congregation.

2) Three attorneys from the area where Petitioner resides testified that they had hired Petitioner and his company, Research Unlimited, on more than one occasion to do legal research and write appellate briefs. Each testified that he had a high opinion of petitioner's work product, his legal capabilities, and personal qualities and each found him to be honest and trustworthy.

3) Two other area attorneys offered testimony of their personal and/or professional relations with the Petitioner during the period of revocation. One of these witnesses testified to his admiration of the Petitioner's "ethical morality", the other testified to the Petitioner's "keen awareness of ethical standards";

4) A former legal assistant testified that she considered Petitioner to be a mentor and another legal secretary/legal assistant, who had known Petitioner since 1985, testified to the high quality of his legal research, his devotion to the law and both testified to his honesty and integrity.

5) An auto salesman who met Petitioner shortly after he was released from prison and who has known him for approximately seven years testified as to Petitioner's honesty and rehabilitation.

6) Suzanne Kallan, PhD, a clinical psychologist

testified that Petitioner had been in treatment with her on a regular basis since 1986. She found the Petitioner to be candid and forthright with her regarding his background, including his criminal convictions. She testified that the petitioner had benefited from psychotherapy and had made psychological and emotional adjustments during his six years of therapy.

7) An attorney who has known Petitioner since 1985, testified that his former law firm had hired the Petitioner to do some research on complex cases and that he had an opportunity to work with Petitioner on some of that research. He, as did all of the attorneys, testified that Petitioner referred to himself as a "researcher", never as an attorney and that Petitioner was sensitive to ethical issues.

8) Another attorney, who has known Petitioner since 1975, testified to the panel about Petitioner's former drinking problems and the changes in Petitioner's attitudes and personality over the past several years to the point that while he and the Petitioner had had conflicts and personality clashes in the past, he would now be willing to associate with Petitioner professionally in the event of his reinstatement.

9) Petitioner's family also testified. Petitioner's daughter, a licensed attorney, testified about her father's attitude and personality changes since his incarceration and how he now takes more interest in church and family. Petitioner's son, also an attorney, testified to the Petitioner's devotion to the law and his resulting motivation to become an attorney. Petitioner's wife testified to Petitioner's efforts to reestablish his relationship with his family and community. She testified that she first noticed these changes while he was in prison, where he attended AA, taught other inmates to

read and participated in a marriage encounter group. She also testified as to Petitioner's decision to go into therapy after his release from prison as well as the end of his abuse of alcohol.(Appd p.45a-48a, 63a-65a)

In addition to the witnesses, Petitioner also testified. The hearing panel had an opportunity to consider and evaluate Petitioner's credibility and sincerity. (Appd p.45a)

After listening to all of the evidence, the hearing panel concluded "that petitioner's conduct since revocation of his license has been exemplary and above reproach"; that Petitioner "has a proper understanding of and attitude imposed of members of the bar" and that Petitioner "has not practiced or attempted to practice law since his license was revoked." (Appd p.66a) As to whether Petitioner could be safely recommended to the public, the courts and the legal profession, the panel stated:

> **"This panel is well aware of the seriousness of the acts which led to the petitioner's conviction and revocation of his license to practice law and the majority concludes that he has sufficiently satisfied this requirement as stated in our conclusion."**(Appd p.66)(Emphasis added)

The panel further stated:

> "Mr. McWhorter has sought to rehabilitate himself with his family, and his community. As serious as his crimes were, **the Court rules, have at all times since his disbarment, led the petitioner to believe that he could file a petition for reinstatement after five years....** Had the Supreme Court wished to preclude certain

offenders from ever applying for reinstatement, it would have done so pursuant to its rule making powers....
(Appd p. 67a)(Emphasis added)

The hearing panel concluded:

> **"However, we are persuaded on the whole record, that Mr. McWhorter has established by clear and convincing evidence that he should be reinstated to the practice of law....**(Appd p.67a) (Emphasis added)

On April 8, 1993, a majority of the hearing panel ordered Petitioner's reinstatement with conditions. Grievance Administrator appealed to the Attorney Discipline Board.

Attorney Discipline Board Proceedings

The Board issued an order to the parties to show cause on May 8, 1993, why the hearing panel's order should not be affirmed. However, prior to such hearing, the Board on its own motion, remanded the matter to the hearing panel for an evidentiary hearing and supplemental report on the nature and scope of Petitioner's supervision while on parole, which was filed December 18, 1993.

The Attorney Discipline Board, on appeal, noted:

> **"The Grievance Administrator does not challenge the panel's factual findings as to those eligibility requirements of MCR 9.123(B) which may be verified objectively, for example whether five years have elapsed since revocation [MCR 9.123 (B)(2)], whether or not the petitioner has practiced or attempted to**

practice law during the period of revocation [MCR 9.123(B)(3)l; the applicant's compliance with the order of revocation MCR 9.123(B)(4)l, and whether or not the applicant's conduct since the order of discipline has been exemplary and above reproach [MCR 9.123(B)(5)l.

Rather, the Board is asked to rule that the hearing panel erred in finding that the petitioner established the requirements of MCR 9.123(B)(5), that the petitioner has a proper understanding of and attitude toward the standards that are imposed on members of the bar and will conduct himself in conformity with those standards, and MCR 9.123(B)(7), that he can be safely recommended to the public, the courts and the legal profession as a person fit to be consulted by others and to represent them and otherwise act in matters of trust and confidence and in general to aid in the administration of justice as a member of the bar and as an officer of the court.

* * *

In short, the Board's review in reinstatement cases must combine and balance the standards enunciated by the Court. i.e. review of the panel's findings for proper evidentiary support, recognition of the element of subjective judgment which is applicable to MCR 9.123(B) and, finally, the measure of discretion granted to the Board with regard to

its ultimate decision.

> **Applying that standard of review to the record in this case, we believe that the hearing panel's decision to grant reinstatement should be affirmed."** (Appd p.43a, 45a,)(Emphasis added)

The Attorney Discipline Board noted that the order revoking Petitioner's license was effective February 24, 1981 and stated:

> **The petitioner passed the temporal milepost created by MCR 9.123(B)(2) on February 24, 1986 and he was eligible to file a petition for reinstatement at that time. In fact, another six years elapses before the petitioner petitioned for reinstatement on April 6 1992.** The record discloses that the criminal conduct engaged in by the petitioner occurred during the years 1977 and 1978. Under [Grievance Administrator v] August, [438 Mich 296, 475 NW2d 256 (1991)] it is appropriate to consider the fourteen year period since the commission of the acts resulting in disbarment. (Appd p.51a) (Emphasis added)

After reviewing pertinent case law, the Board supported the hearing panel's conclusion that:

> When the egregiousness of the petitioner's conduct was weighed against the fourteen years which had elapsed since the misconduct and the eleven years since the effective date of the order of revocation, the scale was not

tipped against reinstatement. (Appd p.53a)

Regarding Petitioner's parole supervision, the Board stated:

> Based upon the supplemental testimony of two federal parole officers assigned to petitioner McWhorter, we cannot conclude that the petitioner was under strict restraint and supervision from 1985 to 1992....On the contrary, the testimony of the parole officers established that his reporting on a monthly basis eventually consisted of little more than perfunctory meetings during which the petitioner confirmed his continued residence and employment in Kalamazoo. This petitioner lived, worked and engaged in sufficient contacts with his community as a whole during the seven years following his incarceration to sharply differentiate this case from the situation presented in [Matter of the Reinstatement Petition of Evan H.]Callanan [Jr, 440 Mich 1207, 487 NW2d 750 (1992)]. (Appd p.54a-55a)

The Attorney Discipline Board concluded that the hearing panel's decision to grant reinstatement was based on ample evidentiary support and "was appropriate application of the subjective judgment which is inherent to a determination of eligibility for reinstatement under MCR 9.123(B)." The Board further concluded that the interim conditions ordered by the panel were unnecessary and ordered unconditional reinstatement. (Appd p.56a, 58-59a) Grievance Administrator petitioned the Michigan Supreme Court for leave to appeal.

Michigan Supreme Court Proceedings

During the pendency of the application, Petitioner sought readmission and was instructed by the Board of Law Examiners to take the Michigan Bar Examination. Petitioner passed the Bar Examination. On August 24, 1994 the Supreme Court stayed the orders of reinstatement by the Hearing Panel and the Attorney Discipline Board. (Appd p.33a-34a)

Leave to appeal was granted on October 19, 1994. (Appd p.32a) Grievance Administrator, as with its appeal to the Board, did not challenge the hearing panel's factual findings as to eligibility requirements of MCR 9.123(B). Grievance Administrator argued on appeal, that the seriousness of Petitioner's offenses precluded his reinstatement to the practice of law and argued that insufficient time had passed since Petitioner's release from parole to allow readmission.

Oral arguments were held on March 8, 1995. On July 5, 1995, (Appd A) the Michigan Supreme Court issued its Opinion. The Opinion of the Court was divided 2-2-1-1-1. Chief Justice Brickley wrote the two Justice Opinion in which four Justices concurred in part with one dissent. Mr. Justice Brickley wrote:

> We initially note that the decision whether to reinstate a disbarred attorney is a balancing process. Moreover, we conclude that a proper analysis of subrules 6 and 7 requires the balancing of several factors. In reviewing the various factors, we recognize that no one factor is conclusive, but, rather, each must be evaluated in light of the others.
>
> Specifically, we must consider whether

petitioner has spent sufficient time outside the supervision of parole authorities and convincingly establish that he has satisfied the requirements of subrules 6 and 7.(Appd 10a)

* * *

Petitioner in the present case applied for reinstatement three months before his release from his federal parole. The Attorney Discipline Board remanded the case to the hearing panel to determine the nature and scope of the federal parole authorities' supervision. The board held that petitioner was not subject to rigid authority during his final period of parole. However, the critical consideration is not the extent of supervision, but rather the fact that petitioner was under the supervision of parole authorities at the time he applied for reinstatement. Although in these proceedings the nature and scope of supervision may be relevant, the mere fact that petitioner had not been away from the supervision of parole authorities greatly influences the determination whether he has sincerely and sufficiently demonstrated that he will be able to understand and operate within the standards of the bar. Therefore, it is only after a petitioner has spent sufficient time outside the control of parole officers that the hearing panel or the Attorney Discipline Board is able to determine whether the petitioner has been rehabilitated and may safely therefore be recommended for reinstatement.

> Although he may not have been subject to strict scrutiny by parole authorities, petitioner was still serving his parole and, upon petition for reinstatement, must demonstrate his honorable behavior outside such authorities for a period that would enable this Court to safely recommend him to the public. To prevent the petitioner's immediate reapplication in the present case, we hold that petitioner is not eligible for reinstatement until June 28, 1997, five years from the date of his release from federal parole. (Appd pp. 11a-12a)

In a footnote Judge Brickley added:

> We note that even though a period of time has now elapsed since petitioner was under the supervision of parole authorities, he has been involved in his petition for reinstatement since his release from parole. Therefore, we are equally unable to safely judge whether petitioner has now been rehabilitated-even though some time has elapsed outside the supervision of parole authorities-because his actions have been under similar, if not heightened, scrutiny by the Attorney Grievance Commission, the hearing panel, and the Attorney Discipline Board. (Appd p.25a)

Justice Brickley continued with his Opinion stating:

> We borrow this time span from MCR 9.123 and analogize it to the present case. For the same reasons, five years is the minimum period after which a disbarred attorney may

be eligible for reinstatement, we would hold that it is a sufficient period outside the supervision of parole authorities and the contemplation of petition for reinstatement to fully evaluate his fitness to practice law....In accord with this decision, even though five years have elapsed since petitioner's disbarment, we find that he is not eligible for reinstatement and would impose this additional period of time to review his fitness. (Appd p. 12a-13a)

* * *

We therefore would reject petitioner's application for reinstatement and would hold that he may not reapply for reinstatement until June 28, 1997, five years from the date of his release from federal parole. We therefore would reverse the decision of the Attorney Discipline Board. (Appd p.14a)

The dissent would affirm the Order of Reinstatement. Justice Levin writes:

McWhorter provided ample evidence in support of the hearing panel's and board's determination. The record read as a whole, demonstrates that McWhorter has the moral and professional fitness to practice law again in this state. (Appd p. 21a)

* * *

In emphasizing the seriousness of the underlying offenses committed by McWhorter, the majority ignores other relevant factors that should be considered in

deciding whether to order reinstatement.

* * *

By requiring McWhorter to wait additional time before reapplying, the majority summarily discounts what is indisputably a solid record of rehabilitation since release from prison under the guise that McWhorter was required to comply with parole regulations. This approach ignores the quality of the substantial evidence presented to the hearing panel and the Attorney Discipline Board.

Finally, I agree with Justice Cavanagh that the imposition of a five-year period from release from parole supervision should be done only by court rule under the Court's rule-making authority. By creating this new requirement at this time, the majority avoids the publication and comment procedure and deprives the profession of an opportunity to comment and suggest alternative approaches. (Appd p. 22a)

Neither the majority nor the dissent addressed the issues of due process, equal protection, ex post facto, or double jeopardy, although the first two issues were argued by Petitioner on appeal as it pertained to permanent preclusion. Petitioner filed a Motion for Rehearing presenting the issues of due process, ex post facto, double jeopardy and denial of equal protection. On September 19, 1995, the Michigan Supreme Court denied rehearing by a 4-3 vote with Justice Mallett, co-author of the Brickley Opinion, Justice Cavanagh and Justice Levin dissenting. (Appd p. 35a)

REASON FOR GRANTING WRIT

The essence of law is its predictability. Law is the statement of rules and principles expected to be observed; the blue print for conduct. The essence of due process is fair play. Galvan v Press, 347 US 522, 530, 74 S.Ct. 737, 742, 98 L.Ed. 911 (1954). The decision of the Michigan Supreme Court, in the instant case, invalidates these principles. It stands for the proposition that a state supreme court may, retroactively, without regard to fairness, change the rules and defeat the rights of a party who has conformed his conduct to the existing rules.

There are several reasons for granting this writ. The decision of the Michigan Supreme Court: (1) violates the Ex Post Facto Clause, Art. I§10, of the U.S. Constitution. It is the application of a new punitive measure to a crime already consumated; (2) violates the double jeopardy provision of the 5th Amendment of the Constitution. It imposes a civil sanction that cannot be said to, soley, serve a remedial purpose, but rather is punishment as we know it; (3) lacks even an element of basic fairness, addresses an issue [eligiblity] that was never briefed, never argued and never heard, gives the appearance of impropriety and violates the state constitution, state statutes and the court's own rules in a manner and for reasons that contravene the due process clause of the 14th Amendment and (4) clearly applies a different rule to Petitioner than had been applied all other Michigan lawyers under same or similiar circumstances and improperly delegates judicial authority to Respondent in violation of the equal protection clause of the 14th Amendment.

Ex Post Facto

In In Re Ruffalo, 390 US 544, 88 S.Ct. 1222, 20 L. Ed.2d 117, (1968), this Court stated: "Disbarment, designed to protect the public, is a punishment or penalty imposed upon the lawyer" and "quasi-criminal in nature". In Cal. Dept. of Corrections v Morales, 514 U.S. __, 115 S. Ct. __, 131 L. Ed. 2d 588 (1995), citing Calder v Bull, 3 Dall 386, 1 L. Ed. 648 (1798) and Beazell v Ohio, 269 U.S. 167, 46 S. Ct. 68, 70 L. Ed. 216 (1925), this Court stated that the Ex Post Facto Clause of Article 1 §10 was "aimed at laws that 'retroactively alter the definition of crimes or increase the punishment for criminal acts.'" In Morales this Court reaffirmed the proposition in Lindsey v Washington, 301 US 397, 57 S. Ct. 797, 81 L. Ed. 1182 (1937), that the constitution "forbids the application of any new punitive measure to a crime already consummated."

In Bouie v Columbia, 387 US 347, 84 S.Ct. 1697, 12 L.Ed. 2d 894 (1964), this Court applied the Ex Post Facto Clause to actions of a state supreme court stating:

> An ex post facto law has been defined by this Court as one 'that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action'; or that 'aggravates a crime, or makes it greater than it was when committed'. (citations omitted) If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction.

In 1981, when Petitioner's license was revoked, the penalties for his misconduct were fixed by court rule. Among those penalties was the rule that Petitioner was ineligible to reapply for his license for five years. (Appd p.109a) In 1994, the Michigan Supreme Court reaffirmed this punishment. The court, however, went one step further and stated that if an attorney had been denied reinstatement after the passage of five years, that attorney could reapply for reinstatement in six months. (Appd p.99a) In this case, without amending or abolishing the aforementioned rules, the court, retroactively, extended Petitioner's punishment. The court stated that Petitioner could not apply for reinstatement until five years after the termination of penal supervision. Further, to enforce this prohibition, the court, in derogation of the six month rule, specifically held that Petitioner could not reapply until the end of June, 1997, more than fifteen years after his license revocation. By any definition, this is an increase in the penalty applied to this Petitioner.

In Landgraf v USI Film Prods, __ US__ 114 S.Ct. 1522, 128 L. Ed. 2d 299 (1994), this Court stated that the Ex Post Facto Clause is intended to not only insure that individuals have fair warning about the effect of criminal statutes but also to restrict governmental power by restraining arbitrary and potentially vindictive legislation. The rule making power of the court, as it pertains to attorney discipline and reinstatement, is legislative. In the instant case, the court's agent and employee, Respondent did not request that all similarly situated attorneys be permanently disbarred, but asked only that Petitioner be permanently disbarred. Through a form of circuitous reasoning, this arbitrary and capricious request was administratively legislated in its decision.

The court, through its new rule, held that Petitioner could not be reinstated because Petitioner was under "supervision", regardless of the extent of that supervision and states that Petitioner's post penal supervision period of three years could not be considered because of "heightened scrutiny" while reapplying for his license. By implication, this is permanent disbarment, contrary to existing Michigan court rule and contrary to the punishment imposed upon Petitioner at the time of his conviction and the revocation of his license. Under this rationale, Petitioner could never demonstrate his rehabilitation.

The new rule created by the supreme court's decison is clearly an increase in the punishment set by court rule at the time of the "quasi-criminal" disbarrment proceedings. It is further an increase in the punishment rendered to Petitioner as a result of his criminal conviction. Under either circumstance the new rule, as applied, in ex post facto.

Double Jeopardy

In U.S. v Halper, 490 U.S. 435, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989), this Court held that a civil penalty may constitute double jeopardy. In Halper, this Court said:

> In making this assessment, the labels 'criminal' and 'civil' are not of paramount importance. It is commonly understood that civil proceedings may advance punitive as well as remedial goals, and, conversely, that both punitive and remedial goals may be served by criminal penalties.(cite omitted) The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law, and for the

purposes of assessing whether a given sanction constitutes multiple punishment barred by the Double Jeopardy Clause, we must follow the notion where it leads. (citation omitted) ([T]he labels affixed either to the proceedings or to the relief imposed... are not controlling and will not be allowed to defeat the applicable protections of federal constitutional law') To that end, the determination whether a given civil sanction constitutes punishment in the relevant sense requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve. **Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment.**

These goals are familiar. We have recognized in other contexts that punishment serves the twin aims of retribution and deterrence. (cite omitted) (these are the "traditional aims of punishment"). Furthermore, "[r]etribution and deterrence are not legitimate nonpunitive governmental objectives." (cite omitted) **From these premises, it follows that a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.** (Emphasis added)

The new rule, as retroactively applied, served no remedial purpose. It was not advocated by the court as remedial. The court made that clear when it indicated that the three years since termination of parole could not be considered because Petitioner had been applying for reinstatement. Three of the concurring opinions concurred only because the new rule precluded Petitioner from immediate reinstatement and those justices advocated permanent preclusion, retroactively applied. Under Halper, this is punishment, retroactively applied, constitutes double jeopardy.

Due Process

Under Michigan General Court Rule 972, (Appd p.109a) in effect at the time of Petitioner's disbarment, Petitioner was eligible to apply for reinstatement after five years. This eligibility was reaffirmed in the court rules of 1985 and as amended in 1994. (Appd p.97a-100a)

The hearing panel and Attorney Discipline Board noted that Petitioner was eligible to apply for reinstatement in 1986. Petitioner, instead, waited six years after he became eligible for reinstatement to re-earn his good name and reputation.

Petitioner did all that the law required for reinstatement. He rebuilt his good name, his reputation, and demonstrated his honesty, reliability and trustworthiness. He paid the fees and costs to apply for reinstatement including attorney fees, went through four days of public hearings plus a supplemental hearing, appealed to the Attorney Discipline Board and Petitioner took and passed the Michigan Bar Examination.

The hearing panel and the Attorney Discipline Board found that Petitioner had established "by clear and

convincing evidence that he should be reinstated to the practice of law." (Appd p.45a, 67a) Despite these findings, Petitioner was denied reinstatement by the Michigan Supreme Court based on a new rule, retroactively applied, in a results based decision.

As set forth by the hearing panel: "**the court rules have at all times since his disbarment led the petitioner to believe that he could file a petition for reinstatement after five years.**" (Appd p. 67a) As noted by the Attorney Discipline Board, Respondent did not "challenge the panel's factual findings as to...eligibility requirements...for example whether five years have elapsed since revocation."(Appd p.43a)

This Court and the Michigan Supreme Court have repeatedly held that they will not consider questions not raised and passed upon in a court below. Springer v U.S., 102 US 586, 26 L.Ed. 253 (1880); Poelman v Payne, 332 Mich 597; 52 NW2d 229 (1952). The issue of eligibility was never raised by Respondent. The right of prior notice and hearing is central to due process. Parham v Cortese, 407 US 67, 92 S.Ct. 1983, 32 L.Ed 2d 556 (1972). The issue of eligibility to apply for Petitioner's license was never briefed, never argued, and never heard. Further, the Michigan Supreme Court certified through its clerk and its employee, the Grievance Administrator, that Petitioner was eligible for reinstatement in 1992.

Respondent is the employee of the court. In that capacity, Respondent meets with the court to discuss attorney discipline including reinstatements. Neither Petitioner nor his counsel, nor any other attorney involved in disciplinary or reinstatement proceedings may meet with the court, ex parte. The Due Process Clause entitles a person to an

impartial and disinterested tribunal in both civil and criminal cases. Marshall v Jerico, 446 US 238; 100 S. Ct. 1610, 64 L.Ed. 2d 812 (1980). Under the Michigan procedure, it is impossible to discern when the court is functioning administratively and when it is functioning judicially. Due process requires a separation between those who enforce the law and those who adjudicate the law. The relationship of master and servant defeats due process or at the very least, gives the appearance of impropriety.

In Schware v Board of Bar Exam. of State of New Mexico, 353 US 232, 77 S.Ct. 752, 1 L.Ed. 2d 796 (1957), this court stated that:

> A state cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the 14th Amendment. (citations omitted) A state can require high standards of qualification such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with applicant's fitness or capacity to practice law.

Under Article 6 §28 of the Michigan Constitution of 1963, the Michigan Supreme Court does not have de novo review of reinstatement proceedings. State Bar Grievance Administrator v Estes, 390 Mich 585; 212 NW2d 903 (1973). As set forth in In Re: Freedman 406 Mich 256, 277 NW2d 635 (1995), In Re: Grimes, 414 Mich 483, 326 NW2d 380 (1982) and Grievance Administrator v August, 438 Mich 296, 475 NW2d 256 (1991), "the findings of the Hearing Panel and Attorney Discipline Board are to be

reviewed for proper evidentiary support on the whole record." (Appd p. 81a) Respondent nor the court contested that the hearing panel and Attorney Discipline Board lacked evidentiary support for their findings that Petitioner was currently fit to again practice law.

The "substantial evidence" requirements of Article 6, §28 to uphold an administrative determination has been construed by the Michigan courts as "more than a mere scintilla but somewhat less than preponderance." Farmers Bank of Concord v Dep't of Comm. Financial Inst. Bur., 77 Mich App 313, 258 NW2d 496 (1977). Because the court could not directly attack the decisions of the hearing panel and Attorney Discipline Board, the court changed the rules and the new rule had nothing to do with fitness, moral character or capacity to practice law.

Michigan, by statute, Michigan Compiled Laws 338.41-338.47, has expressed its desire that convicted offenders assume "the responsibilities of citizenship" and not be deterred in their attempts to "occupational or professional" licenses. MCL 338.42 provides that: "A license shall not be denied solely on the basis of prior misdemeanor or felony conviction unless it is related reasonably and adversely to the ability to serve the public in the licensed area." (Appd p.82a) The supreme court's decision in the instant case, is in contravention of the intent of this statute. Petitioner's parole status is not "reasonably and adversely" related to Petitioner's ability to serve the public.

Respondent argued below that a license to practice law "is a privilege bestowed by the state." In Schware, supra, this court made clear that the "practice of law is not a matter of the State's grace." This Court has also held that there is a right to follow a chosen profession free from

unreasonable governmental interference and that such right comes within the "liberty" and "property concepts of the 5th Amendment." U.S. v Robel, 389 U.S. 258, 88 S.Ct. 419, 19 L.Ed. 2d 508 (1967). Petitioner contends not that he had a right to practice law but that he had a vested right to apply and if he met the stated qualifications, that his license would be reinstated.

In 1994, only eight months before its decision in the instant case, the Michigan Supreme Court amended its court rules regarding eligibility for reinstatement to include an expressed provision that an attorney whose license to practice law had been revoked was eligible to apply after five years, (Appd p.98a-99a) and expressly stated that if the attorney were denied reinstatement he could file a new petition for reinstatement six months later. In the instant case, the court abrogated both rules and only applied the new rule to attorneys convicted of a crime and placed on some form of penal supervision. Further, without hearing or notice, the Michigan Supreme Court withdrew its 1992 certification of eligibility.

In Rio Grand Irrigation & C. Co. v Guildersleeve, 174 US 603, 19 S. Ct. 761, 43 L. Ed. 1103 (1898), this court held:

> A duly authorized rule of court has the force of law, and is binding upon the court as well as upon parties to an action, and can not be dispensed with to suit the circumstances of any particular case... The courts may rescind or repeal their rules without doubt; or, in establishing them, may reserve the exercise of discretion for particular cases. But the rule once made without any such qualification

must be applied to all cases which come within it, until it is repealed by the authority which made it.

The Michigan Supreme Court tries to analogize the five year extension of eligibility for Petitioner to the initial five year requirement under MCR 9.123 (Appd p.97a) on the grounds that Petitioner could not demonstrate trustworthiness because of supervision. However, in a footnote, the court states that the three year lapse since the end of parole supervision could not be considered because Petitioner was under the supervision and restraints of applying for his license. This is a circuitous argument. Petitioner, under this reasoning, will never be able to establish his eligibility because it will always be alleged that he was under some form of supervision while waiting to reapply.

The actions of the Michigan Supreme Court directly contradict this Court's statements in Willner v Committee on Character and Fitness, 373 U.S. 96, 83 S.Ct. 1175, 10 L.Ed.2d 224 (1963), wherein this Court said that the requirements of fairness "extend to the concluding parts of the procedure as well as to the beginning and intermediate steps." In effect, the Michigan Supreme Court, after the entire reinstatement procedure had been completed retroactively, by decision, amended its court rules. However, in order to formulate the new rule, the Michigan Supreme Court violated its own rule regarding amendments, particularly as it related to notice and comment.(Appd p.85a)

It is true that the court rule providing for amendment states that the court may "dispense with the notice requirements of this rule if it determines that there is a need for immediate action." As written, the rule implies an emergency. There was no emergency. The only immediate

action was to keep this particular petitioner from being reinstated to the practice of law, retroactively.

As this Court stated, in Matthews v Eldridge, 424 US 319, 96 S.Ct 893, 47 L.Ed.2d 18 (1976), due process is not a technical conception with fixed content unrelated to time, place and circumstances but is flexible and calls for such procedural protections as a particular situation demands. The creation of a new rule and retroactively applying that rule after nearly three years of hearings, tests, expense and hardship, is not due process.

Article 6, §1 of the Michigan Constitution vests the judicial power of the state in one court of justice which is divided into the supreme court and the inferior courts. Article 6, §5 of the Michigan Constitution empowers the supreme court to make "general rules establish, modify, amend, and simplify the practice and procedure in all courts of this state." (Appd p. 81a) The Michigan Supreme Court, through court rule, established its procedure and created the administrative agency that exists today. As set forth in Rio Grand Irrigation, supra, the procedure established by the court is binding on the court as well as upon the parties. The court can not do indirectly that which it can not do directly without violation of due process.

Equal Protection

In support of its opinion denying reinstatement and the new rule, the Michigan Supreme Court relies on its order granting peremptory reversal in Matter of Callanan, 440 Mich 1207, 487 NW2d 750 (1992), wherein the court, without hearing or argument stated:

> The misconduct that led to the revocation of petitioner's license to practice law was substantial and, because the petitioner had

> spent little or no time outside the supervision of federal authorities since his license was revoked, it was not possible for the hearing panel and the Attorney Discipline Board to determine the present fitness of the applicant for readmission.

Peremptory reversal orders have become common place in Michigan as noted in the dissent.

What the court did not state in its 1992 order was that Callanan had not established that he was, in fact, off parole. What the court did not disclose in the instant case, was the fact that Callanan, immediately after the court's order, filed a new application for reinstatement, was reinstated and has been practicing law for approximately two years. Under the rule in this case, Callanan would not have been eligible to apply for reinstatement until months after he had already been practicing law.

A hundred or more lawyers have been disbarred or suspended, placed on some form of penal supervision and reinstated in the State of Michigan between Petitioner's license revocation in February, 1981, and the court's new rule on July 5, 1995. The new rule applies only to lawyers placed on penal supervision, but does not apply to lawyers who are incarcerated or those who were suspended or revoked for criminal misconduct but fortunate enough not to be prosecuted. The classification is arbitrary with no rational basis.

Respondent asks the Michigan Supreme Court to permanently preclude Petitioner from the practice of law although such preclusion did not exist at the time of Petitioner's criminal conviction or license revocation. In response to a question by the court, Respondent admitted that

it could not think of an instance where an attorney in Michigan had been permanently disbarred.

Petitioner acknowledges that exact equality is not a prerequisite for equal protection. Norvel v Illinois, 373 Mich 420, 83 S.Ct 1366; 10 L.Ed. 2d 456 (1963). However, the purpose of equal protection is to rest the rights of all persons upon the same rule under similar circumstances. Frost v Corp. Com. of Okla., 278 U.S. 515, 49 S.Ct. 235, 73 L.Ed. 483 (1929).

There was a discriminatory purpose in the decision of the Michigan Supreme Court. It was intended to thwart, discourage and prevent this particular Petitioner from being reinstated into the practice of law and consequently, those attorneys who thereafter were placed on some form of penal supervision. As stated, the Opinion did not address those disbarred attorneys who were incarcerated, or who were disbarred for severe misconduct but fortunately not criminally sanctioned. In McCleskey v Kemp, 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987), this Court said that where the decision maker selects or reaffirms a particular cause of action, at least in part because of its adverse affect on an identifiable group, it is a violation of equal protection.

Petitioner acknowledges that the 14th Amendment guarantees equality of laws, not equality of results, Massachusetts v Feeny, 442 US 256, 99 S. Ct. 2282, 60 L. Ed. 2d 870 (1979). However, in the instant case, the law mandated one action and the court took another.

The Equal Protection Clause commandment that no state shall deny any person within its jurisdiction the equal protection of laws is essentially a direction that all persons similarly situated should be treated alike. City of Celburne,

Tex. v Celburne Living Center, 473 US 432, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985). A hundred or more Michigan lawyers were similarly situated to Petitioner between 1986 and 1995. All had had their licenses suspended or revoked for criminal or gross civil misconduct, many of whom were placed on some form of penal supervision. Not one of these "similarly situated" attorneys was denied reinstatement because of his supervision status. All "similarly situated" who so desired were permitted to seek reinstatement within the time set forth by the court rule, all except Petitioner.

A minority of the court would have retroactively applied a rule permanently precluding Petitioner from the practice of law. Although, Respondent admitted to the court that no attorney in Michigan history had been permanently precluded. Respondent concluded its argument asking the court to permanently preclude only this Petitioner. The adverse affect sought by the employee and agent of the Supreme Court of Michigan was a course of action designed to have an adverse affect on an identifiable group of one, Petitioner. This is a denial of equal protection.

As stated above, the relationship between Respondent and the court is that of master-servant. Respondent meets with the court in administrative meetings regarding attorney discipline on a regular basis. The rule as adopted by the supreme court in this case, is not self-enforcing. It relies on the decision of Respondent.

Michigan Court Rule 9.124 requires an applicant seeking reinstatement to file his application with the clerk of the supreme court, with the Grievance Commission and the Attorney Discipline Board. The clerk of the supreme court verifies when the applicant's license was revoked or

suspended. If the requisite time under MCR 9.124 has passed, the supreme court clerk notifies the Commission and the Discipline Board that they may proceed. The clerk of the supreme court has no knowledge nor does the Discipline Board whether the applicant was placed on some form of penal supervision. This allows Respondent to determine if the issue will be raised in the first instance and whether Respondent, unilaterally, will enforce the new rule. Only Respondent can appeal a hearing panel conclusion. If the issue of penal supervision is not raised in the hearing by Respondent, it is a non-issue and therefore a non-barrier to reinstatement.

The Michigan Supreme Court in the six months since its decision, has not acted to change the written rules to incorporate this unusual sanction. As set forth above, it has delegated to Respondent, its employee and agent, a degree of latitude that denies equal protection.

The co-author of the new rule, Justice Mallett, voted for rehearing when the issues presented above were brought to his attention, as did Justice Cavanagh and Justice Levin. Their votes speak loudly as to why this Court should grant the Writ of Certiorari.

CONCLUSION

WHEREFORE, Petitioner prays that a Writ of Certiorari be granted.

Robert A. McWhorter
Petitioner

Michigan Supreme Court
Lansing, Michigan 48909

Syllabus

Chief Justice	Justices
James H. Brickley	Charles L. Levin
	Michael F. Cavanagh
	Patricia J. Boyle
	Dorothy Comstock Riley
	Conrad L. Mallett, Jr.
	Elizabeth A. Weaver

This syllabus was prepared by the Reporter of Decisions.

Reporter of Decisions
William F. Haggerty

In re PETITION FOR REINSTATEMENT OF ROBERT A McWHORTER

Docket No. 99848. Argued March 8, 1995 (Calendar No. 14). Decided July 5, 1995.

The Attorney Grievance Commission filed a formal complaint with the Attorney Grievance Board against Robert A. McWhorter after he was found guilty in federal court of aiding and abetting the manufacture of methamphetamine. The petitioner subsequently was disbarred; however, the order of disbarment was vacated after the United States Court of Appeals for the Sixth Circuit vacated the district court's decision and remanded the case for trial. Meanwhile, the petitioner was convicted in the Kalamazoo Circuit Court of kidnapping and conspiracy to kidnap. A second formal

complaint was filed, and his license to practice law was revoked as a result of those convictions. After remand on the federal charges, the petitioner was convicted by a jury of drug-related offenses and was sentenced to ten years imprisonment with a two-year special parole term. The United States Court of Appeals for the Sixth Circuit affirmed, 705 F2d 459 (CA 6, 1982).

On June 28, 1992, the petitioner was released from federal parole. Three months before being released, he petitioned for reinstatement of his license. The tri-county hearing panel determined that the petitioner had established the requirements for reinstatement pursuant to MCR 9.123(B) by clear and convincing evidence and reinstated him with certain conditions. The Attorney Grievance Commission sought review before the Attorney Discipline Board. The petitioner filed a cross petition, requesting that the conditions imposed by the hearing panel be removed. The Attorney Discipline Board remanded the case to the hearing panel, stating that there was insufficient evidence in the record to evaluate the nature and scope of the supervision of federal authorities. Thereafter, the board concluded that the monitoring of the petitioner by parole authorities was minimal and issued an order modifying the hearing panel's order of reinstatement and reinstated the petitioner and removed the conditions imposed. The Attorney Grievance Commission appeals.

In separate opinions, the Supreme Court *held:*

The petition for reinstatement must be denied, and the petitioner may not reapply for reinstatement until June 28, 1997, five years from the date of his release from federal parole.

Chief Justice Brickley, joined by Justice Mallett,

stated that a review of the entire record does not support the decision of the hearing panel or the Attorney Discipline Board to reinstate the petitioner to the practice of law in this state at this time. The petitioner has not spent adequate time outside the supervision of parole authorities sufficient to demonstrate that he has a proper understanding of and attitude toward the standards imposed on members of the bar or that he will conduct himself in conformity with those standards.

To be eligible for reinstatement to the practice of law, a petitioner must prove by clear and convincing evidence satisfaction of the criteria of MCR 9.123(B)(1) to (7). Where, as in this case, reinstatement of an attorney involves an analysis of subrules 6 and 7, a balancing of several factors is required, such as whether the petitioner has spent sufficient time outside the supervision of parole authorities to clearly and convincingly establish satisfaction of the requirements of the subrules. No single factor is conclusive; each must be evaluated in light of the others.

In this case, the petitioner has not spent sufficient time away from the authority of parole officers to demonstrate by clear and convincing evidence that he safely may be recommended to the public, the Courts, and the legal profession as a person fit to be consulted by others or to represent them and act in matters of trust and confidence. MCR 9.123(B)(7). Sufficient time has not passed in order that he may demonstrate a proper understanding of and attitude imposed on members of the bar under MCR 9.123(B)(6).

Justice Riley, joined by Justice Boyle, concurring, joined in the imposition of a five-year waiting period following a period of parole supervision in the absence of a

majority recognition of permanent disbarment with no opportunity ever to reapply, although the record calls for the permanent disbarment of the petitioner.

Reversed.

Justice Weaver, concurring in the result only, stated that the petitioner should be permanently disbarred because the facts that led to his suspensions from practice, disbarment, and criminal convictions can leave no doubt that he cannot be safely recommended to the public, the courts, and the legal profession. No matter what duration of disbarment is imposed, the conduct that led to it will not change; the totality of the petitioner's conduct cannot be ignored. The finality of permanent disbarment is in the best interests of the public, the courts, the legal profession, and the petitioner.

Justice Cavanagh, concurring, stated that a published opinion is not the appropriate vehicle to set a minimum spacing of five years between subsequent petitions for reinstatement of disbarred attorneys. Rather, the proper way to effect such change is amendment of the court rules.

Justice Levin, dissenting, stated that the order of reinstatement should be affirmed. The length of time following disbarment and unsupervised release into society, in addition to the seriousness of the underlying misconduct, is relevant to the determination whether and when, if at all, a disbarred lawyer should be reinstated. In most jurisdictions reinstatement is possible, even in egregious circumstances, unless a court rule or law precludes reinstatement. In this case, sufficient time has elapsed since McWhorter's offense and his release from incarceration to determine his moral fitness to practice law. Requiring him to wait five years to reapply serves little or no useful purpose. Further, the

imposition of a new five-year period from release from parole supervision should be done only by court rule.
1995 State of Michigan

Opinion

BEFORE THE ENTIRE BENCH
BRICKLEY, C.J.

In this case we decide whether the decisions of the tri-county hearing panel and the Attorney Discipline Board to reinstate petitioner's license to practice law are supported by proper evidence on the whole record. We believe that a review of the entire record doer not support the decision of the hearing panel or the Attorney Discipline Board to reinstate petitioner Robert McWhorter to the practice of law in this state at this time. We conclude that petitioner has not spent adequate time outside the supervision of parole authorities sufficient to demonstrate that he has a proper understanding of and attitude toward the standards imposed on members of the bar or that he will conduct himself in conformity with those standards. We therefore would reverse the decision of the Attorney Discipline Board and deny Mr. McWhorter's petition for reinstatement, and would hold that petitioner may not reapply for reinstatement until June 28, 1997, five years from the date of his release from federal parole.

In December 1978, Robert McWhorter was found guilty in federal court of a ten-count indictment for the offense of aiding and abetting the manufacture of methamphetamine. 21 USC 841(a)(1), 18 USC 2(a), and 21 USC 841(b)(1)(B). He was sentenced to five years

imprisonment with a special parole term of two years. As a result of this conviction, the Attorney Grievance Commission filed a formal complaint against petitioner in January, 1979.[1] Petitioner was disbarred by order filed June 8, 1979. However, the order of disbarment was later vacated by notice dated September 15, 1980, because the United States Court of Appeals for the Sixth Circuit vacated the decision and remanded the case for trial.[2]

Meanwhile, petitioner was convicted in Kalamazoo Circuit Court on May 29, 1980, for an unrelated incident of kidnapping, MCL 750.349; MSA 28.581, and conspiracy to kidnap, MCL 750.157a; MSA 28.354(1). As a result, a second formal complaint was filed on June 20, 1980, charging petitioner with violation of GCR 1963, 953 (2) to (5), and Canon 1 of the Code of Professional Responsibility, DR 1-102 (A)(3) and (4). The convictions arose out of the abduction of David Nixon from McWhorter's law office. The kidnapping was arranged in order to extort money for the payment of McWhorter's legal services. Petitioner's license to practice law was ultimately revoked, effective February 24, 1981, as a result of these convictions.

After remand on the federal charges, on October 3, 1980, petitioner was convicted of drug-related offenses in the United States District Court for the Western District of Michigan, Southern Division. A jury found petitioner guilty of conspiracy to import cocaine into the United States, aiding and abetting the manufacture of methamphetamine, and using a communication facility, i.e., a telephone, to facilitate the manufacture of methamphetamine. The jury also convicted Mcwhorter of conspiracy to manufacture, possess with intent to distribute, and distribute methamphetamine. 21 USC 841(a)(1). Petitioner was sentenced to ten years

imprisonment with a two year special parole term.[3]

The federal convictions arose out of petitioner's attempt to finance a drug-smuggling trip to South America to purchase cocaine and marijuana. McWhorter and an undercover Drug Enforcement Administration agent met and discussed McWhorter's drug-smuggling scheme and his contacts with various drug sources. The DEA agent told McWhorter that he was interested in chemical drugs, and McWhorter responded that he knew a chemist who would manufacture drugs. Additionally, McWhorter offered to render legal services to the undercover agent, proposing to set up a strawman chemical company in order to make detection of the drug scheme more difficult. On appeal, McWhorter contended that he was involved in only one drug conspiracy, i.e., the manufacturing of methamphetamine in order to finance the South American drug-smuggling scheme. The United States Court of Appeals for the Sixth Circuit rejected his argument and affirmed the convictions.[4]

Petitioner served prison terms for both his federal and state convictions. He was released on parole in 1985 and sent to a halfway house in Grand Rapids for the following two months. On June 28, 1992, he was released from federal parole. Approximately three months before being released from federal parole, petitioner filed a petition for reinstatement of his license to practice law in Michigan.

A hearing was held by the tri-county hearing panel and it was determined that petitioner had established the requirements for reinstatement pursuant to MCR 9.123(B) by clear and convincing evidence. Petitioner was therefore reinstated with conditions, including payment of expenses, continuance of weekly therapy sessions, maintenance of church activities, and monitoring by a licensed attorney every

two months for one year.

The Attorney Grievance Commission filed a petition for review of the hearing panel's decision with the Attorney Discipline Board. Petitioner filed a cross petition for review, requesting that the conditions imposed by the hearing panel be removed. The Attorney Discipline Board remanded the case to the hearing panel, stating that there was not "sufficient evidence in the record upon which to evaluate the nature and scope of the 'supervision of federal authorities' . . . ." In May, 1994, the Attorney Discipline Board concluded that the monitoring of petitioner by parole authorities war minimal and issued an order modifying the hearing panel's order of reinstatement. The Attorney Discipline Board reinstated petitioner and removed the conditions imposed by the hearing panel. The Attorney Grievance Commission filed an application for leave to appeal, requesting review of the Attorney Discipline Board's decision. We granted leave to appeal[5] and now reverse.

II

We review the decision of the hearing panel and the Attorney Discipline Board "for proper evidentiary support on the whole record."[6] Grievance Administrator v August, 438 Mich 296, 304; 475 NW2d 256 (1991).[7] We simultaneously recognize that"[t]he power to regulate and discipline members of the bar rests ultimately with this Court pursuant to constitutional mandate." Id.at 304.[8] A license to practice law is "a continuing proclamation by the Supreme Court that the holder is fit to be entrusted with professional and judicial matters and to aid in the administration of justice as an attorney and counselor and as an officer of the court." MCR 9.103(A).Cognizant of this responsibility, we review the decisions of the hearing panel and the Attorney Discipline

Board to reinstate petitioner to determine if they are supported by the record as a whole.

A

In order to be reinstated, petitioner must establish that he is eligible for reinstatement by clear and convincing evidence by proof that he has satisfied the criteria set forth in MCR 9.123(B)(1) to (7):[9]

(1) he or she desires in good faith to be restored to the privilege of practicing law in Michigan;

(2) the term of the suspension ordered has elapsed or 5 years have elapsed since revocation of the license;

(3) he or she has not practiced or attempted to practice law contrary to the requirement of his or her suspension or revocation;

(4) he or she has complied fully with the order of discipline;

(5) his or her conduct Since the order of discipline has been exemplary and above reproach;

(6) he or she has a proper understanding of and attitude toward the standards that are imposed on members of the bar and will conduct himself or herself in conformity with those standards;

(7) taking into account the nature of the misconduct which led to the revocation or suspension, he or she nevertheless can safely be recommended to the public, the courts, and the legal profession as a person fit to be consulted by others and to represent them and otherwise act in matters of trust and confidence, and in general to aid in the administration of justice as a member of the bar and as an officer of the court . . . .

The record appears to support both the hearing panel's and the Attorney Discipline Board's determination

that petitioner has complied with subrules 1 to 5. We are therefore concerned only with whether the record as a whole supports the conclusion that petitioner has established the requirements set forth under subrules 6 and 7. [10]

We initially note that the decision whether to reinstate a disbarred attorney is a balancing process. Moreover, we conclude that a proper analysis of subrules 6 and 7 requires the balancing of several factors.[11] In reviewing the various factors, we recognize that no one factor is conclusive, but, rather, each must be evaluated in light of the others. Specifically, we must consider whether petitioner has spent sufficient time outside the supervision of parole authorities and convincingly establish that he has satisfied the requirements of subrules 6 and 7.

B

The passage of time, by itself, is not be sufficient to support reinstatement.[12] The relevant inquiry is whether petitioner has spent an appreciable time outside the supervision of parole authorities in order for the hearing panel to fully evaluate the disbarred attorney's prevent ability to comport with the fitness requirements. See In re Reinstatement of Callanan, 440 Mich 1207; 487 NW2d 750 (1992); see also August, supra. Moreover, the five-year period after which a disbarred attorney may petition for reinstatement is but "a minimum period in which rehabilitation may occur following revocation of the license to practice law; the passage of five years in no way guarantees eligibility for reinstatement." Id. at 310. In Callanan, supra at 1207, this Court held by order that "[t]he misconduct that led to the revocation of the petitioner's license to practice law was substantial and, because the petitioner had spent little or no time outside the supervision

of federal authorities since his license was revoked, it was not possible for the hearing panel and the Attorney Discipline Board to determine the present fitness of the applicant for readmission."

In August, an attorney was disbarred after he was convicted of attempting to defraud the United States by conspiring with a court clerk in the United States Bankruptcy Court for the Eastern District of Michigan to manipulate the blind-draw system of assigning judges.[13] In an attempt to avoid a judge known to carefully examine and reduce attorney fee awards, August and the clerk arranged the assignment of judges so that August's firm avoided the judge in a significant number of cases.

August was imprisoned for approximately one year and was transferred to a halfway house. He remained there until November 19, 1985, when the district judge reduced his sentence to time already served. August filed a petition for reinstatement of his license to practice law in October, 1988. The Wayne County hearing panel denied his request. The Attorney Discipline Board held that August was eligible for reinstatement. 438 Mich 302-303. On appeal to this Court, we remanded the case to the Attorney Discipline Board to reexamine whether the petitioner could be recommended to a position of trust as a member of the bar. Significantly, we held that the hearing panel is not limited to a choice between reinstatement and permanent disbarment. Rather, we stated that a third alternative exists where it is determined that a sufficient period of time has not elapsed to judge whether the petitioner may be recommended for reinstatement.[14]

Petitioner in the present case applied for reinstatement three months before his release from his federal parole. The Attorney Discipline Board remanded the case to the hearing

panel to determine the nature and scope of the federal parole authorities' supervision. The board held that petitioner was not subject to rigid authority during his final period of parole.[15] However, the critical consideration is not the extent of supervision, but rather the fact that petitioner was under the supervision of parole authorities at the time he applied for reinstatement. Although in these proceedings the nature and scope of supervision may be relevant, the mere fact that petitioner had not been away from the supervision of parole authorities greatly influences the determination whether he has sincerely and sufficiently demonstrated that he will be able to understand and operate within the standards of the bar. Therefore, it is only after a petitioner has spent sufficient time outside the control of parole officers that the hearing panel or the Attorney Discipline Board is able to determine whether the petitioner has been rehabilitated and may safely therefore be recommended for reinstatement. Although he may not have been subject to strict scrutiny by parole authorities, petitioner was still serving his parole and, upon petition for reinstatement, must demonstrate his honorable behavior outside such authorities for a period that would enable this Court to safely recommend him to the public.16 To prevent the petitioner's immediate reapplication in the present case, we hold that petitioner is not eligible for reinstatement until June 28, 1997, five years from the date of his release from federal parole.

We borrow this time span from MCR 9.123 and analogize it to the present case. For the same reasons, five years is the minimum period after which a disbarred attorney may be eligible for reinstatement, we would hold that it is a sufficient period outside the supervision of parole authorities and the contemplation of petition for reinstatement to fully

evaluate his fitness to practice law. In August, supra at 310, this Court stated that five years was the minimum time in which a petitioner could apply for reinstatement, but in no way guaranteed eligibility for reinstatement. In accord with this decision, even though five years have elapsed since petitioner's disbarment, we find that he is not eligible for reinstatement and would impose this additional period of time to review his fitness. We are persuaded that this addresses the problem identified by one commentator: "The disbarred attorney may file another petition at a later date. In light of this, it would be helpful if the rules provided a minimum spacing between subsequent petitions to prevent a lawyer whose petition is denied from immediately filing another petition." Martin, Dean & Webster, Michigan Court Rules Practice (3d ed), p 579, author's comment to MCR 9.123.

We further note that petitioner should not automatically be entitled to reinstatement at the expiration of five years; it is merely the minimum time before he should be permitted to apply for reinstatement because more time may be demonstrate his fitness. August, supra. If petitioner chooses to petition again for reinstatement after the specified date, he would be subject to a full review, including consideration whether he should be subject to permanent disbarment.

III

We conclude that petitioner has not spent sufficient time away from the authority of parole officers to demonstrate by clear and convincing evidence that he may be safely recommended to the public, the courts, and the legal profession as a person fit to be consulted by others or to represent them and act in matters of trust and confidence. MCR 9.123(B)(7). Nor has sufficient time passed in order

that he may demonstrate a proper understanding of and attitude imposed on members of the bar pursuant to MCR 9.123(B)(6). We therefore would reject petitioner's application for reinstatement and would hold that he may not reapply for reinstatement until June 28, 1997, five years from the date of his release from federal parole. We therefore would reverse the decision of the Attorney Discipline Board.

James H. Brickley
Conrad L. Mallett, Jr.

RILEY, J. (concurring)

We agree with Justice Weaver's assessment that this record calls for the permanent disbarment of Mr. McWhorter. However, in the absence of a majority recognizing the proposition that there should be "permanent" disbarment, with no opportunity ever to reapply, we join in the ruling of the lead opinion imposing a five-year waiting period following a period of parole supervision.

Dorothy Comstock Riley
Patricia J. Boyle

WEAVER, J. (concurring in the result only).

While I concur in the result of continuing disbarment reached by the lead opinion, I write separately because I would permanently disbar petitioner Robert McWhorter. The thorough recitation in the lead opinion of the facts that led to petitioner's suspensions from practice, disbarment, and

criminal convictions can leave no doubt that he cannot be safely recommended to the "public, the courts, and the legal profession."[1] Nor am I convinced that petitioner has now or ever will have a proper understanding of the attitude toward the standards that are imposed on members of the bar and will conduct himself . . . in conformity with those standards."[2]

This Court is charged with the responsibility of overseeing the conduct of the membership of the State Bar and has the power to "make any order it deems appropriate . . . . "[3] It has the power to impose, as proposed by the majority, an arbitrary waiting period before petitioner can file for reinstatement. However, what logic there is in imposing an arbitrary waiting period in this case is lost because petitioner will remain under our scrutiny and therefore will probably attempt to conform his conduct to our standards until he reaches his goal of readmittance.

No matter what the duration of petitioner's disbarment, the conduct that led to it will not change. While this petitioner was an attorney, he was convicted by a jury of conspiracy to import cocaine, unlawful manufacture of methamphetamine, using a telephone to facilitate the manufacture of methamphetamine, conspiracy to possess with intent to distribute methamphetamine, and kidnapping a client to extort money. Be used his legal training to set up a strawman corporation to conceal the drug conspiracies. Be had also previously been suspended for mishandling client funds. Regardless of the sympathy or compassion we may have for the situation petitioner McWhorter has made for himself, ever readmitting him to the Michigan State Bar would make a mockery of this Court's duty to protect the public and the profession.

I do not, however, believe that it is practical or advisable to attempt to enumerate types of conduct or categories of crimes that should automatically result in disbarment. This Court should continue to review petitions for reinstatement case by case. In this case, the totality of petitioner's conduct cannot be ignored. The finality of permanent disbarment is in the best interests of the public, the courts, and the legal profession. This finality will also allow petitioner to go forward with his life plans, knowing he need never consider practicing law in Michigan again.

Elizabeth A. Weaver

CAVANAGH, J. (concurring).

I agree with much of the lead opinion. For example, I agree that the petitioner has not spent enough time outside the supervision of parole authorities to demonstrate that he understands, and will conform to, the standards imposed on members of the bar. I agree that he cannot now be safely "recommended to the public, the courts, and the legal profession as a person fit to be consulted by others and to represent them and otherwise act in matters of trust and confidence . . . ." MCR 9.123(B)(7). I also agree that it would be helpful if the rules provided a minimum spacing between subsequent petitions.

I write separately, however, because I do not feel that a published opinion is the appropriate vehicle to set that minimum spacing at five years. I do not necessarily disagree with the five-year ban; I merely believe that the proper way to effect the change is by amending the court rules. The same can be said regarding the issue of permanent

disbarment. If such a penalty is to be created, it should be done through the rule-making process provided in MCR 1.201.

The primary benefits of pursuing such a course are that it provides an opportunity for any interested parties to comment on the proposed changes, and it would let disbarred attorneys know exactly where they stand vis-a-vis reinstatement. Moreover, amending the court rules is superior to constantly interfering with the discretionary decisions of the Attorney Discipline Board each time we feel a wrong decision is made.

Michael F. Cavanagh

LEVIN, J. (dissenting).

The question presented is whether Robert A. McWhorter should be reinstated as a member of the state bar. McWhorter was disbarred following his convictions of federal and state crimes. The hearing panel ordered reinstatement with conditions. The Attorney Discipline Board affirmed.[1]

The majority concludes that McWhorter should not now be reinstated because sufficient time has not elapsed since he was under the supervision of parole officers. The majority imposes a five-year period after which McWhorter may reapply for reinstatement. I would affirm the order of reinstatement.

I

McWhorter was convicted in the United States District Court for the Western District of Michigan of conspiracy to import cocaine, unlawful manufacture of

methamphetamines, and conspiracy to distribute methamphetamines, and was sentenced to ten years imprisonment. In circuit court, McWhorter was convicted of kidnapping and conspiracy to kidnap, and was sentenced two to five years imprisonment.[2] He served the federal and state sentences concurrently in federal prison and was paroled in June, 1985. He remained on parole until June, 1992.

McWhorter was disbarred effective February 24, 1981. After his release from prison, he worked as an automobile salesman, and then started a legal research business. He petitioned for reinstatement in April, 1992, before completion of his parole. In April, 1993, the hearing panel reinstated McWhorter with conditions. These included continued psychotherapy, regular attendance at church, and supervision by a local attorney.[3] The panel majority said:

> [W]e are persuaded on the whole record, that Mr. McWhorter has established by clear and convincing evidence that he should be reinstated to the practice of law. Mr. McWhorter has become an active member of his church. He had been able to rebuild his relationship with his wife, daughter and son. He has established a productive business and appears to be handling the pressures associated with it. He has resumed a life in the community in spite of the opposition he has faced. [4]

The Grievance Administrator appealed the reinstatement order, claiming that McWhorter had failed to establish compliance with MCR 9.123(B)(6)[5] and (7)[6] by clear and convincing evidence and that sufficient time had not elapsed since McWhorter's release from parole to

properly judge his rehabilitation and fitness to practice law. In response to this Court's peremptory reversal in In re Reinstatement of Callanan, 440 Mich 1207 (1992), the board remanded this case to the hearing panel for further testimony concerning the nature and extent of McWhorter's supervision while on parole. In May, 1994, the board affirmed the hearing panel's order and eliminated the conditions.

The board, citing this Court's decision in Grievance Administrator v August, 438 Mich 296; 475 NW2d 256 (1991), observed that eleven years had elapsed between revocation of McWhorter's license and his petition for reinstatement, and more than fourteen years since McWhorter committed the acts that resulted in the convictions. Relying on its interpretation of August, the board rejected the Grievance Administrator's claim that the seriousness of McWhorter's crimes alone requires that he never be reinstated as a member of the state bar. It determined that sufficient time had elapsed to assess McWhorter's fitness to practice law, distinguishing the circumstances in the instant case from those presented in Callanan. The board concluded that the hearing panel's determination was based on ample evidence and "was an appropriate application of the subjective judgment which is inherent to a determination of eligibility for reinstatement under MCR 9.123(B)."

II

In August, supra, this Court held that "the nature of the offense and the time elapsed since its commission and since disbarment are relevant and important considerations in determining whether a disbarred attorney should be recommended to the position of public trust that is held by members of the Michigan State Bar."[7] Thus, "an attorney

may be denied readmission on the grounds that sufficient time has not passed to determine the present fitness of the applicant for readmission. Such a denial should not be deemed a permanent disbarment."[8]

In Callanan, following the August decision, the Court peremptorily reversed the board's reinstatement order, stating, "[t]he misconduct that led to the revocation of the petitioner's license to practice law was substantial, and, because the petitioner had spent little or no time outside the supervision of federal authorities since his license was revoked, it was not possible for the hearing panel and the Attorney Discipline Board to determine the present fitness of this applicant for readmission."[9]

Both August and Callanan suggest that the length of time following disbarment and unsupervised release into society, in addition to the seriousness of the underlying misconduct, is relevant to the determination whether and when, if at all, the disbarred lawyer should be reinstated. The Grievance Administrator argues, and one of my colleagues would hold, that McWhorter's crimes should permanently prevent his reinstatement.[10]

In most jurisdictions reinstatement is possible, even in egregious circumstances, unless a court rule or law precludes reinstatement. The Washington Supreme Court ordered reinstatement in a case involving the misuse of client funds, stating,

> We have based this decision upon the longstanding doctrine of this court and of virtually every other jurisdiction that disbarment is not a permanent disability. Upon a proper showing of rehabilitation, an attorney may be reinstated.[11]

McWhorter provided ample evidence in support of the hearing panel's and the board's determination.[12] The record, read as a whole, demonstrates that McWhorter has the moral and professional fitness to practice law again in this state. In a similar case, In re Reinstatement of Wegner, 417 NW2d 97, 98 (Minn, 1987),[13] the petitioner had been convicted of conspiracy to smuggle marijuana in 1975, was disbarred in December, 1979, was released from prison in 1980, and entered treatment for alcoholism in 1982. In granting reinstatement, the Minnesota Supreme Court observed that the petitioner had acknowledged the wrongfulness of his conduct, the misconduct had occurred twelve years before the court's decision, and the petitioner had been released from prison for 7-1/2 years and had been chemical-free for five years. Further, the petitioner offered substantial evidence of a change for the better in character.[14] The court said:

> We recognize the severity of petitioner's prior misconduct. Indeed, we are not quick to reinstate a lawyer who committed such a reprehensible crime, which led to disbarment in the first instance. However, petitioner has demonstrated by clear and convincing evidence that he has had a change in his professional moral character. [15]

In emphasizing the seriousness of the underlying offenses committed by McWhorter, the majority ignores other relevant factors that should be considered in deciding whether to order reinstatement.

III

Sufficient time has elapsed since McWhorter's offense and his release from incarceration to determine his moral fitness to practice law, in compliance with MCR 9.123(B)

(7). McWhorter was convicted for acts that occurred over seventeen years ago, he was disbarred fourteen years ago, and was released from prison ten years ago. He has been free from parole supervision for almost three years. His parole officers reported that he fully complied with the conditions of parole. [16]

The majority concludes that "the mere fact that petitioner had not been away from the supervision of parole authorities [at the time of petitioning for reinstatement] greatly influences the determination whether he has sincerely and sufficient demonstrated that he will be able to understand and operate within the standards of the bar."[17] As other courts have concluded in similar circumstances, requiring McWhorter to wait five years to reapply at some future time serves little or no useful purpose.[18] It is undisputed that McWhorter complied with all the conditions of his parole and that no adverse incidents were reported by his parole officers. By requiring McWhorter to wait additional time before reapplying, the majority summarily discounts what is indisputably a solid record of rehabilitation since release from prison under the guise that McWhorter was required to comply with parole regulations. This approach ignores the quality of the substantial evidence presented to the hearing panel and the Attorney Discipline Board.

Finally, I agree with Justice Cavanagh that the imposition of a five-year period from release from parole supervision should be done only by court rule under the Court's rule-making authority. By creating this new requirement at this time, the majority avoids the publication and comment procedure and deprives the profession of an opportunity to comment and suggest alternative approaches.

[1] The formal complaint was dated January 10, 1979, charging petitioner with violation of GCR 1963, 953 (1) to (5), GCR 1963, 969, and Canon 1 of the Code of Professional Responsibility, DR 1-102 (A)(1), (3) to (6).

[2] Respondent remained suspended, however, as a result of an order of an Ingham County hearing panel filed on August 5, 1977. In that proceeding, petitioner was suspended from the practice of law for a period of 121 days for misconduct in handling client funds. This Court ultimately affirmed the order of discipline. State Bar Grievance Administrator v McWhorter (On Rehearing), 407 Mich 278, 282; 284 NW2d 472 (1979).

[3] Petitioner was released from federal parole on June 28, 1992.

[4] United States v McWhorter, 705 F2d 459 (CA 6, 1982).

[5] 447 Mich 1202 (1994).

[6] The record "must include a list of docket entries, a transcript of testimony taken, and all pleadings, exhibits, briefs, findings of fact, and orders in the proceeding." MCR 9.122(D).

[7] See In re Grimes, 414 Mich 483; 326 NW2d 380 (1982); In re Freedman, 406 Mich 256; 277 NW2d 635 (1979). See also State Bar Grievance Administrator v Estes, 392 Mich 645, 649-650; 221 NW2d 322 (1974), reviewing this Court's refusal to "substitute [its] judgment 'for that of the panel below which had an opportunity and a mandate not only to garner evidence of misconduct but to observe and assess the demeanor and credibility of the witnesses,"' citing State Bar Grievance Administrator v Estes, 390 Mich 585, 597; 212 NW2d 903 (1973).

[8] See Const 1963,art 6, § 5;See also Grimes, n7 supra at 489-490, stating"[i]t is this Court, however, that has ultimate responsibility to oversee the conduct of the... members of the State Bar, and to keep unsullied the reputation of the profession."

[9] We do not consider MCR 9.123(B)(8) and (9) because they are not applicable in the present case.

[10] Although each requirement under MCR 9.123(B) in interrelated, each subrule evaluates a different aspect of petitioner's eligibility. In this manner, we held in August, supra at 310 that subrule 6 is primarily directed to the question of the applicant's ability, willingness and commitment to conform to the standards required of members of the Michigan State Bar. Subrule 7 shifts the focus to the public trust which this Court has the duty to guard."

[11] Quoting In re Raimondi, 285 Md 607, 618; 403 A2d 1234 (1979), we have previously summarized this balancing process in August, supra at 307, stating:

> "On one side of the scale is placed the seriousness of the misconduct which produced disbarment and the court's duty to society at large to see that only those persons who are worthy of the faith and confidence of the general public are permitted to handle the affairs of others. . . . On the other side are placed the subsequent conduct and reformation of such individual, his present character, his present qualifications and competence to practice law, and the fact that the very nature of law practice places an attorney in a position where an unprincipled individual may do

tremendous harm to his client."

[12] See In re Brown, 166 W Va 226, 235; 273 SE2d 567 (1980), stating: "Most courts hold that the mere passage of time alone is insufficient to warrant reinstatement."

[13] August was convicted under 18 USC 371 of conspiring to defraud the United States of the due administration of justice and under 18 USC 1503 of impeding the due administration of justice and attempting to influence a court clerk in the discharge of her official duties. Id. at 299.

[14] This Court held: Finally, we do not agree with the board's assessment that the reinstatement criteria allow only two possibilities: that petitioner be now readmitted or forever barred from the practice of law in this state. A third alternative is illustrated
in this case, where the hearing panel determined that petitioner "could not now be safely recommended as a person of trust." [Id. at 312-313.]

[15] The Attorney Discipline Board stated: [T]he testimony of the parole officers established that his reporting on a monthly basis eventually consisted of little more than perfunctory meetings during which the petitioner confirmed his continued residence and employment in Kalamazoo.

[16] We note that even though a period of time has now elapsed since petitioner was under the supervision of parole authorities, he has been involved in his petition for reinstatement since his release from parole. Therefore, we are equally unable to safely judge whether petitioner has now been rehabilitated-even though some time has elapsed outside the supervision of parole authorities-because his actions have been under similar, if not heightened, scrutiny by the Attorney Grievance Commission, the hearing panel, and the Attorney Discipline Board.

Opinion Footnotes- 14/March, 1995: Weaver, J. (Concurring in the result only).

[1] MCR 9.105 and MCR 9.123(B)(7)
[2] MCR 9.123 (B)(6)
[3] MCR 9.122 (E)

Opinion Footnotes - 14/March, 1995: Levin, J. (dissenting)

[1] McWhorter appealed the conditions of reinstatement. They were eliminated by the board without contest by the Grievance Administrator.

[2] See People v Buckey/McWhorter, 424 Mich 1; 378 NW2d 432 (1985), and People v McWhorter (On Remand), 150 Mich App 826; 389 NW2d 499 (1986).

[3] McWhorter presented testimony from numerous witnesses, including his pastor, family members, and other local attorneys who testified to the changes in his personality and his current moral fitness and character. His pastor discussed McWhorter's extensive and sincere (in the pastor's opinion) involvement in church activities. McWhorter's wife and children related the changes in McWhorter's personality and the improvement in their relationships with him. Local attorneys who knew McWhorter or used his legal research services testified to his competence and skill. His therapist testified regarding the progress he had made in therapy since he started while on parole in 1986. McWhorter testified, and acknowledged that numerous personal problems affected his judgment at the time the crimes were committed, including alcoholism and emotional difficulties.

[4] The dissenting member of the panel said that "McWhorter has made significant strides in becoming a contributing member of our society, but I do not believe he has yet

established that he should be reinstated to the honorable practice of law at this time."

[5] Under MCR 9.123(B)(6), a petitioner must establish by clear and convincing evidence that "he or she has a proper understanding of and attitude toward the standards that are imposed on members of the bar and will conduct himself or herself in conformity with those standards."

[6] MCR 9.123(B)(7) provides that the board must conclude by clear and convincing evidence that the petitioner "can safely be recommended to the public, the courts, and the legal profession as a person fit to be consulted by others and to represent them and otherwise act in matters of trust and confidence, and in general to aid in the administration of justice as a member of the bar and as an officer of the court..."

[7] Id. at 313-314

[8] Id. at 314. The majority acknowledged that the seriousness of the underlying criminal conduct should be considered in deciding whether a disbarred lawyer should be reinstated, distinguishing between conduct unrelated to the practice of law and conduct involving the corruption of the administration of justice. Id. at 310. The majority also noted that some jurisdictions hold that certain conduct may be so egregious that reinstatement should be precluded; however, the Court declined to so rule on the facts presented. Id. at 313.

The Court remanded for a determination whether sufficient time had elapsed to assess August's fitness and a majority of the board panel subsequently ordered reinstatement. however, the Court issued a peremptory reversal of the order and denied the petition for reinstatement on the basis of reasoning of the dissenting opinion.

In re Reinstatement of August, 441 Mich 1207 (1993).

[9] Id. at 1207. Both the hearing panel and the ADB ordered reinstatement. Callanan had been released from confinement in November, 1988, almost four years before the Court's October 30, 1992, order.

[10] Although this Court in August, supra at 313, n 11, noted that certain states have permanently precluded reinstatement under some circumstances, some of these ruler have changed since August was decided. The United States Court of Appeals for the District of Columbia overruled In re Kerr, 424 A2d 94 (DC App, 1980), in In re McBride, 602 A2d 626 (DC App, 1992), in which the court revisited the District of Columbia Code provision related to disbarment for acts of moral turpitude and concluded that it should not be interpreted to require permanent disbarment. 602 A2d 640-641.

[11] In re Rosellini, 108 Wash 2d 350, 364; 739 P2d 658 (1987). See also In re Robbins, 172 Ariz 255, 256; 836 P2d 965 (1992); Florida Bar re Hipsh, 586 So 2d 311, 314 (Fla, 1991) (distinguishing between disbarred and permanently disbarred, but still permitting application for reinstatement by leave of court).

> The West Virginia Supreme Court observed:
> The concept of rehabilitation cannot be framed around a set of specific principles but will vary depending on the particular facts of a given case. Rehabilitation, ultimately, is demonstrated by a course of conduct that enables the Court to conclude there is little likelihood that after such rehabilitation is completed and the applicant is readmitted to the practice of law he will engage in

unprofessional conduct. [In re Brown, 166 W Va 226, 234; 273 SE2d 567 (1980).]

[12] N 3 supra.

[13] See also In re Trygstad, 472 NW2d 137 (Minn, 1991) (reinstating an attorney who had been disbarred for 7-1/2 years on the basis of his conviction for the sale of cocaine to an undercover officer).

[14] Wegner presented evidence that alcohol had been a serious problem in his life at the time of his misconduct, that he had undergone a marked change in his personality since disbarment, that he had been a conscientious and diligent worker in his employment after release from prison, that he participated in Alcoholics Anonymous and had abstained from alcohol since 1982, and that a psychiatrist had determined that he had made a complete psychological rehabilitation since 1978 with no chance that he would repeat his illegal behavior. Id. at 99.

Other courts have concluded that petitioners who had offered substantial evidence of their good conduct and treatment since disbarment should be reinstated. In Rosellini, n 11 supra, the Washington Supreme Court noted that the petitioner had sought professional counseling, worked in increasingly responsible positions, received letters praising his integrity and honesty from employers, and participated in a wide variety of community activities, including his church and his children's schools. Id. at 359. See also In re Moynihan, 113 Wash 2d 219; 778 P2d 521 (1989) (reinstatement was ordered for a lawyer who had been disbarred for misuse of client funds on the basis of evidence that he participated in alcohol treatment and community activities, as well as letters from members of the community testifying regarding his character and professional

reputation); Robbins, n 11 supra, (reinstatement was ordered for a lawyer disbarred for misuse of client funds on the basis of evidence that he had worked diligently to reform himself and had been a good citizen for more than a decade).

[15] Id. at 100. The court imposed several conditions on reinstatement, including continued sobriety.

[16] In Callanan, it was unclear how much time had passed since Callanan had been released from parole, although it appears to have been for far less time than in the instant case. In August, the petitioner waited three years after release from prison to request reinstatement, as distinguished from seven in the instant case.

[17] Slip op, p 12.

[18] See Wegner, 417 NW2d 99-100; Rosellini, n 11 supra at 360; cf. In re Avcollie, 43 Conn Supp 13, 22; 637 A2d 409 (1993) ("A redemptive and rehabilitative life requires the passage of time for documentation").

Michigan Supreme Court
Lansing, Michigan

Order
Entered: February 28, 1995

James H. Brickley
Chief Justice
Charles L. Levin
Michael F. Cavanagh
Patricia J. Boyle
Dorothy Comstock Riley
Conrad L. Mallett, Jr.
Elizabeth A. Weaver
Justices

In re Petition for Reinstatement
of ROBERT A. McWHORTER

ROBERT A. McWHORTER,
Petitioner-Appellee,
and
GRIEVANCE ADMINISTRATOR, SC 99848
Appellant. ADB 92-83-RP

On order of the Court, the motion to strike is considered, and it is DENIED.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.
February 28, 1995

Clerk

Michigan Supreme Court
Lansing, Michigan

Order
Entered: October 19, 1994

James H. Brickley
Chief Justice
Charles L. Levin
Michael F. Cavanagh
Patricia J. Boyle
Dorothy Comstock Riley
Conrad L. Mallett, Jr.
Elizabeth A. Weaver
Justices

In re Petition for Reinstatement
of ROBERT A. McWHORTER

ROBERT A. McWHORTER,
Petitioner-Appellee,
and
GRIEVANCE ADMINISTRATOR,
Appellant.

SC 99848
ADB 92-83-RP

Leave to appeal GRANTED.
Reconsideration DENIED.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.
October 19, 1994

Clerk

Michigan Supreme Court
Lansing, Michigan

Order
Entered: August 24, 1994

James H. Brickley
Chief Justice
Charles L. Levin
Michael F. Cavanagh
Patricia J. Boyle
Dorothy Comstock Riley
Conrad L. Mallett, Jr.
Elizabeth A. Weaver
Justices

In re Petition for Reinstatement
of ROBERT A. McWHORTER

ROBERT A. McWHORTER,
Petitioner-Appellee,
and
GRIEVANCE ADMINISTRATOR, SC 99848
Appellant. ADB 92-83-RP

Motion for immediate consideration is considered, and it is GRANTED. Motion for a stay also is considered, and it is GRANTED. The reinstatement order entered by the Attorney Discipline Board on May 20, 1994, and the earlier reinstatement order entered by the Hearing panel are STAYED until the further order of this Court.

Motion to strike also is considered, and it is *DENIED*. The application for leave to appeal remains under consideration.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

August 24, 1994

_____

Clerk

Michigan Supreme Court
Lansing, Michigan

Order
Entered: September 19, 1995

James H. Brickley
Chief Justice
Charles L. Levin
Michael F. Cavanagh
Patricia J. Boyle
Dorothy Comstock Riley
Conrad L. Mallett, Jr.
Elizabeth A. Weaver
Justices

Rehearing No. 339
In re Petition for Reinstatement
of ROBERT A. McWHORTER

ROBERT A. McWHORTER,
Petitioner-Appellee,
v
GRIEVANCE ADMINISTRATOR, SC 99848
Appellant. ADB 92-83-RP

In this cause, a Motion for rehearing is considered, and is hereby DENIED.

Levin, Cavanagh, and Mallett, Jr., JJ., would grant rehearing.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

September 19, 1995

Clerk

STATE OF MICHIGAN
ATTORNEY DISCIPLINE BOARD

In the Matter of the Reinstatement
Petition of Robert A. McWhorter, P 17563,

Petitioner. Case No. 92-38-RP

_____/

ORDER OF REMAND

Considered by the Attorney Discipline Board
719 Griswold Street, Suite 1910, Detroit, MI

A Conditional Order of Reinstatement was issued by Tri-County Hearing Panel #15 in this matter of April 7, 1993. A Petition for Review has been filed by the Grievance Administrator seeking reversal of the hearing panel's order. Pursuant to MCR 9.118(B), the Attorney Discipline Board issued an Order to Show Cause on May 6, 1993 directing the parties to appear before the Board on July 8, 1993 to show cause why the hearing panel's order should not be affirmed. The motion of petitioner Robert A. McWhorter to adjourn that hearing was granted by the Board and this matter was rescheduled for review hearing on September 9, 1993.

The Board has conducted a preliminary review of the pleadings filed by the parties and the issues to be considered. Specifically, the Board has considered the evidence in the record below concerning the petitioner's parole from 1985 to June 28, 1992. The Board has further considered an order denying reinstatement issued by the Michigan Supreme Court in the Matter of the reinstatement of Evan H. Callanan, Jr., 440 Mich 1207; 487 NW2d 750 (1992). In that order, the Court ruled that:

"The misconduct that led to the revocation of the petitioner's license to practice law was substantial and, because the petitioner had spent little or no time outside the supervision of federal authorities since his license was revoked, it was not possible for the hearing panel and the Attorney Discipline Board to determine the present fitness of the applicant for readmission".

Based upon this review, the Board has concluded that there is not sufficient evidence in the record upon which to evaluate the nature and scope of the "supervision of federal authorities" in this case as that term appears in Matter of the Reinstatement of Evan H. Callanan, Jr., supra.

The Board has further concluded that development of a complete record on this issue will best serve the interests of the public, the courts, the legal profession and the petitioner.

NOW THEREFORE,

IT IS ORDERED that this matter is REMANDED to Tri-County Hearing Panel #15 for an evidentiary hearing confined to the precise nature and scope of the petitioner's supervision by federal authorities during the period of his parole, including but not limited to the general procedures or guidelines, if any, employed by the probation office of the United States District Court for the Western District of Michigan and the frequency and extent of the petitioner's contact with the probation office or other federal authorities during the period of his parole.

Following such a hearing, the panel is directed to file a supplemental report with the Board summarizing its findings and conclusions with regard to the nature and extent

of the petitioner's supervision by federal authorities while on parole.

IT IS FURTHER ORDERED that the hearing shall be scheduled by the assignment clerk of the Attorney Discipline Board as soon as may be practical.

ATTORNEY DISCIPLINE BOARD

BY:_____
John F. Burns, Chairman

STATE OF MICHIGAN

Attorney Discipline Board

In the Matter of the Reinstatement Petition of Robert A McWhorter, P 17563, Petitioner.

_____/ Case No. 92-83-RP

ORDER DENYING MOTION TO ENLARGE SCOPE OF REMAND HEARING

Considered by the Attorney Discipline Board
719 Griswold Street, Ste 1910, Detroit, MI

This reinstatement matter was remanded to a hearing panel for a supplemental report in accordance with an Order of Remand issued by the Board on August 2, 1993.

The hearing was scheduled and conducted on September 28, 1993. The Board has considered the motion filed on behalf of the Grievance Administrator on September 29, 1993 requesting that the scope of the remand hearing be enlarged to allow the Administrator to present evidence bearing upon the petitioner's compliance with MCR 9.123(B)(3,4).

The Board has further considered the supporting affidavit filed October 1, 1993. The Board is not persuaded that the motion and supporting affidavit are sufficiently detailed as to the nature and scope of the activities in question.

NOW, THEREFORE,

IT IS ORDERED that the Grievance Administrator's Motion to Enlarge the Scope of the Remand Hearing is DENIED.

ATTORNEY DISCIPLINE BOARD

By_____
Elaine Fieldman, Chairperson

STATE OF MICHIGAN
ATTORNEY DISCIPLINE BOARD

In the Matter of the Reinstatement
Petition of Robert A McWhorter, P 17563,

Petitioner/Appellee.

Case No. 92-83-RP

BOARD OPINION

This is a reinstatement matter involving a former attorney, Robert A McWhorter, whose license was suspended for 121 days, effective October 29, 1979 and subsequently revoked effective February 24, 1981. That revocation order was the result of the respondent's conviction on May 29, 1980 of the crimes of kidnapping and conspiracy to forcibly seize and kidnap another with the intent to extort money in violation of MCLA 750.349 and MCLA 750.157(a).[1]

On April 8, 1993, the hearing panel assigned to rule upon the petitioner's fitness for reinstatement entered an order of reinstatement, with conditions. By a vote of two to one, the panel found that the petitioner had fulfilled the applicable criteria of MCR 9.123(8) and had established his eligibility for reinstatement by clear and convincing evidence.

The Grievance Administrator has petitioned for review on the grounds that the seriousness of the criminal conduct which resulted in revocation of petitioners license precludes his reinstatement. The petitioner filed a

cross-petition for review seeking the elimination of the conditions imposed by the panel.

In accordance with MCR 9.118(8), the Attorney Discipline Board issued an order to show cause on May 6, 1993 directing the parties to appear before the Board to show cause why the hearing panel's conditional order of reinstatement should not be affirmed. Prior to such hearing, the Board, on its own motion, remanded this matter to the hearing panel for an evidentiary hearing and supplemental report on the nature and scope of the petitioner's supervision by federal authorities during the period of his parole. The panel's supplemental report, filed December 13, 1993, was accompanied by exhibits and transcripts of the testimony of two federal parole officers regarding the petitioner's supervision from August 1988 through June 1992. That proceeding is included in the record considered by the Board on review.

On review, the Board must first determine whether or not the findings of the hearing panel have proper evidentiary support on the whole record. In re Freedman, 406 Mich 256; 277 NW2d 635 (1979); In re Grimes, 414 Mich 483; 326 NW2d 380 (1982); Grievance Administrator v August, 438 Mich 296 (1991).

As in August, supra, the Grievance Administrator's challenge is not to the factual findings of the hearing panel but to the panel's ultimate determination that the petitioner should now be reinstated, notwithstanding the nature of his criminal conduct in 1977 and 1978, the resulting felony convictions and the revocation of his license to practice law in 1981. While the Board reviews that judgment for adequate evidentiary support, the Board at the same time possesses a measure of discretion with regard to its ultimate decision.

In re Daggs, 411 Mich 304, 318-319; 307 NW2d 66 (1981); Grievance Administrator v August, 438 Mich 296, 304 (1991).

The Grievance Administrator does not challenge the panel's factual findings as to those eligibility requirements of MCR 9.123(B) which may be verified objectively, for example whether five years have elapsed since revocation [MCR 9.123 (B)(2)], whether or not the petitioner has practiced or attempted to practice law during the period of revocation [MCR 9.123(B)(3)l; the applicant's compliance with the order of revocation MCR 9.123(B)(4)l, and whether or not the applicant's conduct since the order of discipline has been exemplary and above reproach [MCR 9.123(B)(5)l.

Rather, the Board is asked to rule that the hearing panel erred in finding that the petitioner established the requirements of MCR 9.123(B)(5), that the petitioner has a proper understanding of and attitude toward the standards that are imposed on members of the bar and will conduct himself in conformity with those standards, and MCR 9.123(B)(7), that he can be safely be recommended to the public, the courts and the legal profession as
a person fit to be consulted by others and to represent them and otherwise act in matters of trust and confidence and in general to aid in the administration of justice as a member of the bar and as an officer of the court.

As the Grievance Administrator points out, the petitioner's prior criminal misconduct stands as irrefutable evidence that in 1977 and 1978 he did not have a proper understanding of and attitude toward the standards imposed on practicing members of the bar at that time. We are not persuaded, however, by the claim on appeal that the petitioner failed to establish at reinstatement proceedings

conducted some fourteen years later that he had satisfied the criteria of MCR 9.123(B) (6,7).

In Grievance Administrator v August, supra, the Supreme Court ruled that the Board had applied an erroneous standard of review to the panel's findings under MCR 9.123(B). There the Board reversed a hearing panel decision denying reinstatement to a petitioner whose license had been revoked following a felony conviction. The conviction in that case stemmed from August's collaboration with a clerk of a United States Bankruptcy Court to manipulate the blinddraw system for assigning judges. In August, the Court distinguished sub-rule (6) which deals with the applicant's ability, willingness and commitment to conform to the standards required of members of the bar from sub-rule (7) which focuses on the public trust which the Court (and its adjudicative and prosecutorial branches) must protect. Specifically, the Court noted that sub-rule (7) involves "the discretionary question of whether the Court is willing to present that person to the public as a counselor, member of the state bar, and officer of the Court bearing the stamp of approval from this Court". August, 438 Mich 296, 311.

In its discussion of those criteria, the Court recognized "an element of subjective judgment in the application of MCR 9.123 (B)", August, supra at 311. We cannot conclude that the element of subjective judgment referred to by the Court in August is reserved for judicial review of contested reinstatement matters. Certainly, an element of subjective judgment by the Board is entirely consistent with the Courts pronouncement that the standard of review to be applied by the Board includes "a measure of discretion with regard to its ultimate decision". In re Daggs, 411 Mich 304, 318-319 (1981); Grievance Administrator v

August, supra at 304. More importantly, the element of subjective judgment in the application of MCR 9.123(B)(6,7) is applicable to the findings and conclusions of the hearing panel which is in the unique position during the reinstatement process of assessing the character and demeanor of the petitioner and, in some cases, the credibility of other witnesses who may be called to testify.

In short, the Board's review in reinstatement cases must combine and balance the standards enunciated by the Court. i.e. review of the panel's findings for proper evidentiary support, recognition of the element of subjective judgment which is applicable to MCR 9.123(B) and, finally, the measure of discretion granted to the Board with regard to its ultimate decision.

Applying that standard of review to the record in this case, we believe that the hearing panel's decision to grant reinstatement should be affirmed.

Public hearings were conducted before the panel on four separate days between August 12, 1992 and November 9, 1992. In the course of those hearings, the panel had ample opportunity to consider and evaluate the credibility and sincerity of the petitioner during his testimony and cross-examination. In addition to that testimony, the panel was in a position not shared by this Board to observe, assess and question if necessary the other witnesses who testified on the petitioner's behalf. These witnesses included:

1) The pastor of the Peoples' Church in Kalamazoo who testified that petitioner has been an active member of that church for approximately four years where he participates in a number of church activities, particularly the "extended family program;

2) Two other members of petitioner's church who testified as to petitioner's reputation for honesty and trustworthiness and his strong participation in activities of the church;

3) Three attorneys from the Kalamazoo area testified that they had hired the petitioner and his company, Research Unlimited, on more than one occasion to do legal research and write appellate briefs. Each testified that he had a high opinion of petitioner's work product, his legal capabilities, and personal qualities and each found him to be honest and trustworthy. Each of these attorneys also testified that he knew of no instance in which the petitioner had attempted to practice law during the period of revocation and that he had not held himself out as an attorney during that period;

4) Two other Kalamazoo attorneys offered testimony of their personal and/or professional relations with the petitioner during the period of revocation. One of these witnesses testified to his admiration of the petitioner's "ethical morality", the other testified to the petitioner's "keen awareness of ethical standards";

5) A former legal assistant to an attorney who appeared on petitioner's behalf testified that she considered petitioner to be a mentor during the year she had known him and that she found him to be trustworthy and honest;

6) An auto salesman who met petitioner shortly after he was released from prison and who has known him for approximated seven years testified as to petitioner's honesty and rehabilitation;

7) A legal secretary/legal assistant who has known

petitioner since 1985 testified as to the high quality of his legal research, his devotion to the law and her impressions as to his honesty and integrity;

8) Suzanne Kallan, PhD, a clinical psychologist testified that petitioner had been in treatment with her on a regular basis since 1986. She found the petitioner to be candid and forthright with her regarding his background, including his criminal convictions. She testified that the petitioner had benefited from psychotherapy and had made psychological and emotional adjustments during the past six years;

9) An attorney who has known petitioner since 1985 testified that his former law firm had hired the petitioner to do some research on complex cases and that he had an opportunity to work with petitioner on some of that research. He testified that petitioner referred to himself as a "researcher", and never as an attorney and that he believed that the petitioner was sensitive to ethical issues;

10) An attorney who has known petitioner since 1975 testified to the panel that he had
observed a change in the petitioner's attitudes and personality over the years to the point that while he and the petitioner had had conflicts and personality clashes in the past, he would be willing to associate with the petitioner professionally in the event of his reinstatement;

11) Petitioner's daughter, a licensed attorney since May 1992, testified that her father's attitude and personality had changed since his incarceration and that he now takes more interest in church and family;

12) Petitioner's son, a law school student, testified to the petitioner's devotion to the law and his resulting motivation to become an attorney;

13) The petitioner's wife testified as to the petitioners efforts to reestablish his relationship with his wife and children since his incarceration. She testified that she first noticed these changes while he was in prison, where he attended AA, taught other inmates to read and participated in a marriage encounter group. She also testified as to the petitioner's decision to go into therapy after his release from prison as well as the end or his abuse of alcohol.

Taken as a whole, the testimony presented by the petitioner and the witnesses on his behalf constitutes a body of evidence upon which the panel could find that the petitioner had satisfied the criteria of MCR 9.123(B) clearly and convincingly.

We are mindful of the witnesses called by the Grievance Administrator in opposition to the petitioner's reinstatement. The petitioner's former legal secretary from 1968 to 1977 testified that during the period of employment by petitioner, he was not timely for meetings or court appearances, was not always truthful with his clients or employees, appeared in court after lunches which included alcohol and that petitioner was getting himself involved... over his head with some of the clients, and there was too much stress for me. I wanted out". (Tr. p. 22)

The chief assistant prosecutor for Kalamazoo County testified as to the petitioner's abrasive and offensive manner toward parties and their counsel prior to his revocation. This witness also testified that he prosecuted the kidnapping case

against the petitioner. During that time, he testified, the petitioner showed no signs of remorse and never acknowledged his guilt.

Finally, the Grievance Administrator called the assistant U. S. attorney assigned to the criminal case against the petitioner in the U. S. District Court for the Western District of Michigan. The witness testified to the nature of the allegations and the proceedings against the petitioner. He also testified that the petitioner refused to acknowledge guilt during the criminal proceedings against him.

As the standard of review makes clear it is not within the Board's province to substitute its own, judgment for that of the hearing panel on issues of credibility. Therefore, it is not necessarily significant that the witnesses on the petitioner's behalf outnumbered those called by the Grievance Administrator. The Board's review for evidentiary support is not concerned with the relative weight which we would give to conflicting testimony if this matter was considered de novo. Nor is the issue before us whether or not there is evidentiary support for the position urged by the party seeking review. Rather the issue is whether or not there is proper evidentiary support for the panels findings. We conclude that there was. Furthermore, it is noteworthy that the witnesses called on the petitioner's behalf testified primarily as to the petitioner's present character and reputation based upon professional or personal relationships with the petitioner since his release from incarceration. By contrast, the witnesses who testified in opposition testified primarily to the petitioner's character and reputation as it existed prior to 1981.

The Grievance Administrator also asserts that the panel should be reversed on the grounds that "the seriousness

of petitioner's criminal conduct precludes his reinstatement". (Grievance Administrator's Supporting Brief, p.9)

Once again, we turn to the Supreme Court's 1991 opinion in Grievance Administrator v Irving August for guidance. In that opinion, the Court made it clear that while MCR 9.123(B)(2) allows a disbarred attorney to apply for reinstatement after five years, this "temporal milepost" merely fixes the minimum time after which a disbarred attorney may be declared rehabilitated. August, supra at 309. As the Court noted:

> "The determination whether the disbarred attorney may be safely recommended to the position of public trust held by members of the state bar necessarily requires consideration of the time elapsed since disbarment and since the commission of the acts resulting in disbarment. This is only consonant with the established principle that each attorney misconduct case is to be considered on its own facts. Grimes, 414 Mich 490, State Bar Grievance Administrator v DelRio, 407 Mich 336, 350; 285 NW2d 277 (1979). Obviously the question whether an attorney may be safely recommended to the public is a different inquiry in the case of an attorney whose disbarred resulted for corrupting the administration of law than in the case of an attorney whose disbarment resulted from conduct unrelated to the practice of law. It is also obvious that a showing of present fitness may require a length of period of rehabilitation where an attorney has engaged

> in a repeated or calculated series of acts designed to corrupt the administration of justice than in the case of an attorney whose disbarment resulted from a single instance of similar conduct. . .August at 310.

In this case, the order revoking the respondent's license law became effective February 24, 1981. The petitioner passed the temporal milepost created by MCR 9.123(B)(2) on February 24,1986 and he was eligible to file a petition for reinstatement at that time. In fact, another six years elapses before the petitioner petitioned for reinstatement on April 6 1992. The record discloses that the criminal conduct engaged in by the petitioner occurred during the years 1977 and 1978. Under August, it is appropriate to consider the fourteen year period since the commission of the acts resulting in disbarment.

We must first confront the apparent position taken by the Grievance Administrator that there is no need to weigh the egregiousness of the petitioner's criminal conduct against the time which has elapsed because the nature and scope of petitioner's activity "precludes reinstatement".

In the opinion reversed by the supreme Court in Grievance Administrator v August, the Board stated:

> "Affirmation of the denial of reinstatement in this case demands a ruling that there are certain types of professional misconduct which are so egregious that reinstatement should never be granted. While we do not necessarily disagree with this proposition, it is our belief that the Supreme Court alone has the authority to promulgate such a rule." Matter of the Reinstatement Petition of Irving A August,

Addressing that issue in its opinion in August, the Court noted that a number of jurisdictions do hold that there is conduct so egregious that it should preclude reinstatement to the practice law. However, the Court said:

> "We need not rule on that question because we are not prepared to say that this is such a case". Grievance Administrator v August, 438 Mich 296, 313.

The felonious conduct engaged in by petitioner Irving August resulted in convictions for conspiring to defraud the United States of the due administration of justice in violation of 18 U.S.C. 371, impeding the due administration of justice in violation of 18 U.S.C. 1503, and attempting to influence a court clerk in the discharge of her official duties in violation of 18 U.S.C 1503. In August, the Court noted that:

> "Obviously, the question whether an attorney may be safely recommended to the public is a different inquiry in the case of an attorney disbarred for corrupting the administration of law than in the case of an attorney whose disbarment resulted from conduct unrelated to the practice of law". Grievance Administrator v August, 438 Mich 296, 310.

In the present case, petitioner McWhorter was disbarred following his conviction on state charges of kidnapping and conspiracy to kidnap with the intent to extort money. During the period of revocation, a federal conviction which had previously been dismissed was reinstated. Those convictions include conspiracy to import cocaine, the unlawful manufacture of controlled substances, conspiracy to distribute controlled substances, and using a commercial

facility to facilitate the manufacture of controlled substances.

In August, the Court was not prepared to say that the petitioner's conviction for corrupting the administration of justice was conduct so egregious that it should preclude reinstatement to the practice of law. Mindful of the distinction drawn by the Court in August between a disbarment for corruption of the judicial system and a disbarment for conduct unrelated to the practice of law, we are not prepared to say now that petitioner McWhorter's conviction for conduct not directly related to the practice of law or the administration of justice should bar has reinstatement forever.

After four days of hearing, the hearing panel in this case applied the element of subjective judgment approved by the Court in August and determined that when the egregiousness of the petitioner's conduct was weighed against the fourteen years which had elapsed since the misconduct and the eleven years since the effective date of the order of revocation, the scale was not tipped against reinstatement.

We have also reviewed the panel's decision in light of Matter of the Reinstatement Petition of Evan H Callanan, Jr 440 Mich 1207, 487 NW2d 750 (1992). There, the petitioner's license was revoked effected effective September 1, 1983 following his felony conviction of making false declarations before a grand jury and obstruction of justice. Callanan's petition for reinstatement was filed August 21, 1990. The record before the panel disclosed that, following his conviction, Callanan was incarcerated for a period of three years. Following his release from a half-way house in November 1988, he was on parole until April 7, 1992. The hearing panel's decision to grant reinstatement in Callanan was affirmed by the Board. In lieu of granting leave to

appeal, the Supreme Court peremptorily reversed and ordered that the petitioner not be reinstated at that time. The Court stated:

> "The misconduct that led to the revocation of the petitioner's license to practice law was substantial and, because the petitioner had spent little or no time outside the supervision of federal authorities since his license was revoked, it was not possible for the hearing panel and the Attorney Discipline Board to determine the present fitness of the applicant for readmission".[MCR 9.123(B)(6,7)]
> Callanan, supra.

Recognizing the potential applicability of the Court's order in Callanan to the present case, the Board ordered that the matter be remanded to the hearing panel for further testimony and a supplemental report focusing an the issue of the nature and scope of McWhorter's supervision by federal authorities following his incarceration.

Petitioner McWhorter was incarcerated for a period of forty months. He was on parole from his release in 1985 until June 28, 1992. We have considered the Grievance Administrator's argument that Evaluation of petitioner's conduct while under strict restraint and supervision is not an adequate basis by which to gauge his behavior and render a decision upon his fitness to be reinstated to the practice of law". (Grievance Administrator's Brief, p. 13) Based upon the supplemental testimony of two federal parole officers assigned to petitioner McWhorter, we cannot conclude that the petitioner was under strict restraint and supervision from 1985 to 1992. We find no evidentiary basis in the record for the assertion that the petitioner reported to a federal parole

officer "who monitored his daily activities". On the contrary, the testimony of the parole officers established that his reporting on a monthly basis eventually consisted of little more than perfunctory meetings during which the petitioner confirmed his continued residence and employment in Kalamazoo. This petitioner lived, worked and engaged in sufficient contacts with his community as a whole during the seven years following his incarceration to sharply differentiate this case from the situation presented in Callanan.

Finally, we have considered the petitioner's cross-petition for review which seeks the elimination of the following conditions imposed by the hearing panel: 1) that the petitioner continue his weekly therapy sessions; 2) that petitioner maintain activity with his church and that his minister submit two reports as to petitioner's progress and attitudinal changes at intervals of six months and five months; 3) that petitioner submit bi-monthly reports to the panel from his therapist or a qualified psychologist; and 4) that petitioner attend bi-monthly meetings with an attorney appointed by the Board and that the monitoring attorney submit a report as to petitioner's activities every two months. The panel's conditional order of reinstatement issued April 7, 1993 directed that if the petitioner fully complied with those conditions, a final order of unconditional reinstatement would be entered March 31, 1994.

The Grievance Administrator's argument that the publication of a conditional order of reinstatement will erode public confidence in the legal system by giving the impression that attorneys will be admitted to practice even though full rehabilitation has not been established has been largely vitiated by the Supreme Court's amendment to MCR

9.124(D), effective March 1, 1994 which allows entry of a reinstatement order subject to conditions. Under this rule, such conditions must be "relevant to the established misconduct or otherwise necessary to insure the integrity of the profession, to protect the public, and to serve the interests of justice".

The petitioner has raised legitimate questions regarding the appropriateness of a discipline order requiring attendance at a particular church and he has alluded to potential problems of client confidentiality which may be presented by the monitoring or his practice by another attorney. We need not address these concerns individually. We are persuaded that the record as a whole establishes an adequate basis upon which to evaluate the petitioner's work history, involvement in church activities, voluntary continuation of therapy on a regular basis, family relationships and personal development during the last seven years in his community. We do not find that the interim conditions ordered by the panel in March 1993 are necessary to achieve the protection of the public which is the overriding goal of these proceedings.

For all of the above stated reasons, we conclude that the hearing panel decision to grant reinstatement was based upon ample evidentiary support and was an appropriate application of the subjective judgment which is inherent to a determination of eligibility for reinstatement under MCR 9.123(B). Appropriate grounds for reversal the panel's decision have not been established.

Concurring: John F Burns, George E Bushnell, Jr., Elaine Fieldman, Barbara B Gattorn, Albert L Holtz, Linda S Hotchkiss, M.D. and Miles A Hurwitz.

Not Participating: Marie Farrell-Donaldson and C Beth DunCombe

Attorney Discipline Board
Board Opinion Footnotes

[1] An earlier order of revocation had been entered against the petitioner in Matter of Robert A McWhorter, ADB Case No. 35951-A as the result of his conviction in the United States District Court for the Western District of Michigan of the crimes of aiding and abetting in the manufacture of methamphetamine in violation of Sec. 841(a)(l), (b)(l), (B) Title 21 U.S.C) and Sec 2(a), Title 18 U.S.C. That order of revocation was vacated by the Attorney Discipline Board on September 9, 1980 upon the entry of an order by the U.S. Sixth Circuit Court of Appeals reversing the conviction and remanding the matter for trial. The petitioner was ultimately convicted of conspiracy to import cocaine, unlawful manufacture of methamphetamine and conspiracy to distribute methamphetamine. The petitioner's second appeal to the Sixth Circuit Court of Appeals was denied and those convictions were upheld on October 29, 1982. Disciplinary proceedings based upon the federal convictions were not reinstated. However, the circumstances of the petitioner's federal conviction and his resulting incarceration and parole were included in the investigative report filed with the hearing panel and they were argued and considered by the reinstatement hearing panel.

STATE OF MICHIGAN
ATTORNEY DISCIPLINE BOARD

In the Matter of the Reinstatement Petition
of Robert A McWhorter, P 17563,
Petitioner/Appellee. Case No. 92-83-RP

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ORDER MODIFYING HEARING PANEL ORDER OF REINSTATEMENT

Considered by the Attorney Discipline Board
719 Griswold Street, Suite 1910, Detroit, MI

The Grievance Administrator has filed a petition for review asking that hearing panel's Conditional Order Granting Reinstatement be reversed, and the petitioner has filed a cross petition for review asking that the Conditional Order of Granting Reinstatement be modified. The Board has conducted a review hearing in accordance with MCR 9.118, reviewed the pleadings and arguments of the parties and is otherwise fully advised;

NOW, THEREFORE,

IT IS ORDERED that the hearing panel Conditional Order of Reinstatement is MODIFIED by VACATING the following conditions:

1) that the petitioner continue his weekly therapy sessions;

2) that petitioner maintain activity with his church and that his minister submit two reports as to petitioners progress and attitudinal changes at intervals of six months and five months;

3) that petitioner submit bi-monthly reports to the panel from his therapist or a qualified psychologist; and,

4) that petitioner attend bi-monthly meetings with an attorney appointed by the Board and that the monitoring attorney submit a report as to petitioner's activities every two months.

IT IS FURTHER ORDERED that the hearing panel's decision to grant the reinstatement petition of petitioner, Robert A McWhorter is otherwise AFFIRMED.

IT IS FURTHER ORDERED that, as a condition of reinstatement, petitioner shall reimburse the State Bar of Michigan for the costs incurred in this reinstatement matter. Cost are assessed in the total amount of $3721.10. This amount includes the costs assessed by the panel in the sum of $2834 .90 and the additional costs incurred by the panel, Attorney Grievance Commission and the Attorney Discipline Board in the sum of $886.20. Cost payment shall be made payable to the State Bar of Michigan but submitted to the Attorney Discipline Board, 719 Griswold, Ste 1910, Detroit, MI 48226.

ATTORNEY DISCIPLINE BOARD

By_____

Elaine Fieldman, Chairperson

In the Matter of the Reinstatement
Application of Robert A. McWhorter, ABD Case 9-83RP
Petitioner,

REPORT OF TRI-COUNTY HEARING PANEL #15

At a session of Wayne County Hearing Panel #15 of the Attorney Discipline Board, held at One Kennedy Square, Ste. 1910, Detroit Michigan on August 12, 1992.

Present: Robert E. Eggenberger, Chairperson
Philip D. Dexter, Panel Member
Roberta M. Hamm, Panel Member

Appearances: Susan Gilloly, ESQ.
Counsel for Grievance Administrator

John F. X. Dwaighy, ESQ.
Counsel for Petitioner

Also Present: Robert A. McWhorter, Petitioner

RECORD

Public hearings were conducted on the petition for reinstatement of Robert A. McWhorter at the offices of the Attorney Discipline Board on August 12, 1992, August 26, 1992, September 4,1992, and November 9, 1992.

Robert E. Eggenberger, Chairperson, Philip D. Dexter, Panel Member and Roberta M. Hams, Panel Member, were present throughout the hearing sessions.

EXHIBITS

1. Investigative Report of the Grievance Administrator pursuant to MCR 9.124 (B)
2. Petitioner's Exhibit 1 - Letter dated August 7, 1992
3. Petitioner's Exhibit 2 - Letter dated August 6, 1992
4. Petitioner's Exhibit 3 - Letter dated August 6, 1992
5. Petitioner's Exhibit 4 - U. S. Government Memo dated February 23, 1984
6. Petitioner's Exhibit 1 - Letter dated February 1, 1990 from the Kalamazoo Civic Players
7. Petitioner's Exhibit 2 - Business card
8. Petitioner's Exhibit 6 - Settlement Agreement
9. Respondent's Exhibit A - Letter dated July 31, 1992
10. Respondent's Exhibit B - Letter dated August 7, 1992
11. Respondent's Exhibit C - Appendix
12. Respondent's Exhibit C - Yellow Pages advertisement
13. Respondent's Exhibit D - Letter from Probation Officer Scrutchions dated August 19, 1992
14. Respondent's Exhibit E - Deposition synopsis of Darcy C. Gray
15. Respondent's Exhibit F - Application for relief from State Bar Client Security Fund

FINDINGS OF FACT

Petitioner, Robert A. McWhorter is 53 years of age and was licensed to practice law in the State of Michigan in 1966. The primary area of petitioner's practice of law was criminal defense.

Petitioner Robert A. McWhorter's license to practice was under consideration for revocation pursuant to two separate felony charges and two separate complaints.

In a Formal Complaint filed on or about January 31,

1979, File Na. 35953-A, petitioner was charged with violation GCR 953 (1-5), 969 an Canon 1 of the Code of Professional Responsibility, DR 1-102 (A) (l), (3-6) pursuant to his conviction of a ten count indictment in the United States District Court, Western District of Michigan for the felony of knowingly, intentionally and unlawfully aiding and abetting in the manufacture of methamphetamine, a schedule III controlled substance.

On October 3, 1980, Mr. McWhorter was found guilty in United States District Court, Western District of Michigan, of aiding and abetting in the manufacture of methamphetamine, in violation of 21 USC 841 (a) (1); 18 USC 2(a) and 21 USC 841 (b)(l)(B).

By notice dated September 15, 1980, the order of disbarment was vacated due to the 6th Circuit remand of Mr. Mcwhorter's criminal case to the Michigan court for trial. The petitioner was subsequently found guilty.

A second Formal Complaint was filed on or about June 20, 1980, File No. DP 120/ 80, petitioner being charged with violation of Canon 1 of the Code of Professional Responsibility DR1-102 (A)(3)-(4) and GCR 953 (2)-(5), pursuant to his conviction in Kalamazoo County Circuit Court of kidnapping in violation of MCLA 750.349, and of conspiracy to forcibly seize and kidnap another with intent to extort money in violation of MCLA 750.157 (a).

On May 29, 1980, Mr. McWhorter was found guilty of these charges.

Petitioner's License to practice law was revoked effective February 24, 1981 as a finding of DP 120/80.

Petitioner was previously suspended for misconduct in handling the funds of a client, File No. 33925. The suspension of 121 days effective November 21, 1979 was

affirmed as on appeal, Docket No. 60689.

A Notice of Automatic Suspension pursuant to MCR 9.128 for Mr. McWhorter's failure to reimburse the State Bar of Michigan for costs associated with File No. DP 120/80 was filed September 9, 1980. A Supplemental Order to Pay Cost, was filed July 16, 1992 wherein, Mr. McWhorter entered into a payment agreement to reimburse the State Bar of Michigan $100.00 per month commencing August 1, 1992 until the total amount of $1993.99 is repaid.

Mr. McWhorter's appeals of his convictions were unsuccessful and he served a prison terms for both the federal and state convictions. Additionally, Mr. McWhorter served a two year parole for his drug offense. The parole was completed on June 28, 1992.

During the trial, Petitioner presented numerous witnesses who testified as to his character.

The pastor of the church that Petitioner joined several years ago testified on petitioner's behalf. Several church members also provided testimony in support of Mr. McWhorter. Most of these individuals were aware that petitioner had spent time in prison. However they were not aware of the nature of the crimes he had committed. Most of the witnesses were informed of Mr. McWhorter's background in anticipation of petitioner's request for their testimony at this hearing.

Several members from the State Bar of Michigan also testified on Petitioner's behalf. They all generally acknowledged Petitioner's technical skills but going beyond their professional involvement with Mr. McWhorter, their personal interaction with him appeared to be limited and most of the witnesses knew the petitioner on the average of only two years.

One witness, a practicing attorney in the Kalamazoo area, has known the petitioner since 1975. He described the petitioner as arrogant and abrasive with police and other attorneys in the past but that he is now a different person.

Mrs. McWhorter testified on her husband's behalf. She acknowledged that the stresses of his law practice had contributed in part to his abuse of alcohol and his other problems. She further testified that her husband has changed.

Mr. McWhorter was under treatment with a therapist for 6 years. The therapist testified that Petitioner became involved in criminal activities because of his strong desire to be liked. She further testified that the support systems he has in place now would prevent him from succumbing to the pressures and stresses that led to his involvement in criminal activities in the past.

Mr. McWhorter has had a drinking problem in the past. Testimony by witnesses indicated that this may have impaired his ability to properly handle legal matters on occasions. Mr. McWhorter denies being an alcoholic but acknowledges that he had a drinking problem. He feels that because he could control the number of drinks he took he was not an alcoholic. He abused alcohol because of emotional pain. His therapist did not treat him for alcohol abuse. He did however participate in a group therapy program in prison (not AA). Petitioner testified that this problem cannot happen again because his priorities have changed and he now only takes an occasional social drink. There was no testimony presented to the contrary regarding petitioner's present drinking habits.

After release from prison, Mr. McWhorter worked for a short period of time as an automobile salesperson. Subsequent to that, he has been self-employed operating a

legal research company in Kalamazoo, Michigan, Research Unlimited, Inc.

The Grievance Board presented three witnesses who testified against the fitness of Mr. McWhorter to resume the practice of law. These individuals were familiar with Petitioner's conduct prior to his prison term. Two of these individuals were members of the Michigan State Bar. The third witness, worked as Mr. McWhorter's legal secretary for approximately nine years. The testimony of these three persons described Mr. McWhorter as unreliable, not truthful and not always thorough in handling legal matters.

The record also contains letters from other individuals who support Mr. McWhorter's reinstatement.

DISCUSSION AND CONCLUSIONS OF LAW

Under MCR 9.123 an attorney whose license to practice law has been revoked is not eligible for reinstatement until he has petitioned for reinstatement, and has established by clear and convincing evidence that (1) he desires in good faith to be restored to the privilege of practicing law in Michigan; (2) 5 years have elapsed since the revocation of his license; (3} he has not practiced or attempted to practice law contrary to the requirement of his revocation; (4) he has fully complied with the order of discipline; (5) his conduct since the order of discipline has been exemplary and above reproach; (6) he has a proper understanding of and attitude toward the standards that are imposed on members of the bar and will conduct himself in conformity with those standards; (7) he can be safely recommended to the public, the courts, and the legal profession as a person fit to be consulted by others and represent them and otherwise act in matters of trust and confidence, and in general to aid in matters of trust and

confidence, and in general to aid in the administration of justice as a member of the bar and as an officer of the Court; (8) he must be recertified by the Board of Law Examiners; and (9) he has reimbursed the client security fund of the State Bar of Michigan.

This panel concludes that Mr. McWhorter, having filed a petition for reinstatement, has established by clear and convincing evidence the he desires in good faith to be restored to the privilege of practicing law in this state. His petition so states, and as did many of the witnesses who testified on his behalf.

The record discloses that more than five years have elapsed since the revocation of Mr. McWhorter's license.

Further, Mr. McWhorter has entered into an agreement to reimburse the client security fund.

Based on the record this panel concludes that petitioner's conduct since the revocation of his license has been exemplary and above reproach.

The majority of this panel concludes that Mr. McWhorter has a proper understanding of and attitude imposed of members of the bar.

This panel further concludes that Mr. McWhorter has not practiced or attempted to practice law since his license was revoked.

With respect to requirement (7) above, as to whether petitioner can be safely recommended to the public, the courts and the legal profession, this panel is well aware of the seriousness of the acts which led to the petitioner's conviction and revocation of his license to practice law and the majority concludes that he has sufficiently satisfied this requirement as stated in our Conclusion.

The petitioner maintains his innocence in the face of

his convictions of very serious climes. The requirement to show remorse no longer exists under the Supreme Court rules. Mr. McWhorter has sought to rehabilitate himself with his family, and his community. As serious as his climes were, the Court rules, have at all times since his disbarment, led the petitioner to believe that he could file a petition for reinstatement after five years and it has been longer than that in petitioner's case. Nowhere is it stated in the rules that a person convicted of kidnapping or conspiracy to kidnap or aiding or abetting in the use of controlled substances shall be permanently disbarred. Had the Supreme Court wished to preclude certain offenders from ever applying for reinstatement, it would have done so pursuant to its rule making powers. It is not the function this panel to make a determination as to what is, or what is not, the basis for permanent revocation.

The Grievance Administrator argues that Mr. McWhorter continued denial of committing the crimes; his lack of remorse; his recent release from parole; and the seriousness of his crimes should at the very least postpone his readmission and at the very most serve to permanently restrict him from becoming a practicing attorney.

However, we are persuaded on the whole record, that Mr. McWhorter has established by clear and convincing evidence that he should be reinstated to the practice of law. Mr. McWhorter has become an active member of his church. He has been able to rebuild his relationship with his wife, daughter and son. He has established a productive business and appears to be handling the pressures associated with it. He has resumed a life in the community in spite of the opposition he has faced.

CONCLUSION

We would reinstate the license of Robert McWhorter upon compliance with the recertification requirement by the Board of Law Examiners pursuant to MCR 9.123(C), the payment by petitioner of the expenses of these proceedings and full satisfaction of the aforestated payment agreement. Petitioners recent release from parole and the seriousness of his crimes warrant that before his license is unconditionally reinstated, that he be monitored for a period of no less than one year. Upon satisfaction of the aforestated and following conditions:

1. The petitioner continue his weekly therapy sessions;
2. The petitioner maintain activity with his church and that the minister of the church shall submit a report and opinion as to petitioners progress and attitudinal changes six months from the effective date of this opinion and a second report five months thereafter. Said reports shall be submitted to this panel;
3. The petitioner shall have his therapist or another otherwise competent or qualified psychologist to submit a report every two months. Said reports shall be submitted to this panel; and
4. Petitioner shall be required to meet with an attorney designated by local Attorney Grievance Board no less than every two months who shall interview and submit a report as to the activities of the petitioner every two months. Said reports shall be submitted to this panel.

Failure of petitioner to comply with said conditions and requirements hereof shall require a reconvening of this panel to consider further action.

If petitioner fully complies with the order hereinbefore set
forth, then effective March 31, 1994, a final order of unconditional reinstatement shall be entered.

ROBERT E. EGGENBERGER, CHAIRPERSON

PHILLIP D. DEXTER, MEMBER

ROBERTA M. HAMM, MEMBER (DISSENTING)

I adopt in full, Chairperson Eggenberger's Findings of Fact. I also concur with him, in regard to his discussion of what the petitioner has established, with two very significant exceptions. I do not feel that the petitioner has established, by clear and convincing evidence, that he can be safely recommended to the public, the courts, and the legal profession as a person fit to be consulted by others and to represent them and other wise act in matters of trust and confidence, and in general to aid in the administration of justice as a member of the bar and as an officer of the court, as required by subsection (7) of MCR 9.123. Nor do I believe that petitioner has a proper understanding of and attitude imposed of members of the bar as required by section (6) of MCR 9.123.

Petitioner has testified that he was not guilty of wrongdoing and he refuses to be remorseful for something he did not do. Petitioner is correct in arguing that remorse for wrongful acts, is not a prerequisite for eligibility for reinstatement. However, the petitioner was convicted by a

jury of his peers. His appeals were denied. Not only must the nature and seriousness of his acts be considered in any recommendation of the petitioner to the public, the courts and the legal profession but also whether petitioner possesses the requisite understanding for the high standard with which any member of our Bar is expected to hold the law.

The petitioner has exhibited a serious disregard for the sanctity of the law. He refuses to acknowledge his wrongdoing and while not related to the reason for his disbarment the record shows that he has been the subject of other disciplinary action.

The testimony of the three witnesses presented by the Grievance Board clearly put into question Mr. McWhorter's truthfulness, ethical considerations professional demeanor and his capability to properly handle legal matters.

In addition, although the requisite five years for application of reinstatement have passed, petitioner was only released from parole on June 28, 1992. One must question whether petitioner's exemplary behavior has been due to his supervised living under parole or has he really been rehabilitated to the high level with which attorneys are held.

This question is obviously one raised in the minds of my fellow panel members or they would not have imposed the additional conditions before final reinstatement. Yet can one rest secure in any monitoring system. Most certainly there will be clients and matters that will be started and completed before the bi-monthly interviews or even the therapy sessions.

Petitioner's own therapist testified that, petitioner has a need to be liked yet it was this need that caused the events that placed him in prison. Should not an attorney who has practiced in the area of criminal law for over ten years be

astute enough to recognize criminal activity and refrain from participating in such wrongdoing.

There were many individuals who testified in petitioner's behalf. But most of these individuals have known Mr. McWhorter for only a few years and in the limited setting of a church. A setting, the very nature of which demands proper behavior.

The petitioner very honestly indicated that he may at some future date practice criminal law again. I applaud him for his honesty. But it appears that it was the pressures of such a practice, excessive drinking and an attitude of arrogance that eventually led to Mr. McWhorter criminal activity and the loss of his license. In spite of assurances by his therapist, who it appears gave no consideration to his drinking problem in treating Mr. McWhorter, I cannot safely say, Mr. McWhorter would not once again fall into such behavior.

Mr. McWhorter has made significant strides in becoming a contributing member of our society, but I do not believe he has yet established that he should be reinstated to the honorable practice of law at this time. Grievance Administrator v August, 438 Mich 296, 475 NW 2d 256, 262 (1991).

STATE OF MICHIGAN
ATTORNEY DISCIPLINE BOARD

In the Matter of the Reinstatement
Petition of Robert A. McWhorter, P17563,

Petitioner. _____/ Case No.92-83-RP

CONDITIONAL ORDER OF REINSTATEMENT

Considered by Attorney Discipline Board
Tri-County Hearing Panel #15

This matter is before the panel upon the filing of a Petition for Reinstatement by petitioner, Robert A. McWhorter, pursuant to MCR 9.124(A), and the Grievance Administrator having submitted a report summarizing all available evidence bearing upon petitioner's eligibility for reinstatement, and the petitioner having established by clear and convincing evidence the criteria for reinstatement set forth in MCR 9.123(B), and the panel having filed its report containing its findings and conclusions, by majority, that reinstatement should be granted, and being otherwise advised;

NOW, THEREFORE

IT IS ORDERED that the Petition for Reinstatement filed in this matter by Robert A. McWhorter Is GRANTED, subject to the following conditions:

1) IT IS FURTHER ORDERED that reinstatement is conditioned upon payment by

petitioner of costs in the amount of $2834.90. Cost payment shall be made payable to the State Bar of Michigan, but submitted to the Attorney Discipline Board [719 Griswold Street, Suite 1910, Detroit, MI 48226] for proper crediting.

2) IT IS FURTHER ORDERED that petitioner's right to engage in the active practice of law in the State of Michigan shall, in accordance with Rules 2 and 3 of the Supreme Court Rules Concerning the State Bar of Michigan, be conditioned upon petitioner's active membership in the State Bar of Michigan. It shall be petitioner's responsibility to notify the Attorney Discipline Board and the Grievance Administrator, in writing, that his annual dues to the State Bar of Michigan have been paid.

3) IT IS FURTHER ORDERED that reinstatement is conditioned upon petitioner's recertification by the Board of Law Examiners of Michigan as required by MCR 9.123(C). It shall be the responsibility of the petitioner to file proof of his recertification by the Board of Law Examiners with the Attorney Discipline Board together with proof of service showing service upon the Grievance Administrator, the State Bar of Michigan [306 Townsend Street, Lansing, MI 489331, and the hearing panel.

IT IS FURTHER ORDERED that reinstatement of petitioner's license to practice law in Michigan shall be deemed effective upon the submission of satisfactory proof

to the Attorney Discipline Board that petitioner has fulfilled each of the conditions described above.

IT IS FURTHER ORDERED that upon fulfillment of the above conditions, the petitioner shall be monitored for a period of no less than one year, subject to the following conditions:

1) The petitioner continue his weekly therapy sessions;

2) The petitioner maintain activity with his church and that the minister of the church shall submit a resort and opinion as the petitioner's progress and attitudinal changes six months from the effective date of this opinion and a second report five months thereafter. Said reports shall be submitted to this panel;

3) The petitioner shall have his therapist or another otherwise competent or qualified psychologist to submit a report every two months. Said reports shall be submitted to this panel; and

4) Petitioner shall be required to meet with an attorney designated by the Attorney Grievance Commission no less than every two months who shall interview and submit a resort as to the activities of the petitioner every two months. Said report shall be submitted to this panel.

IT IS FURTHER ORDERED that failure of petitioner to comply with said conditions and requirement hereof shall require a reconvening of this panel to consider further action.

IT IS FURTHER ORDERED that if petitioner complies with the Order hereinbefore set forth, then effective March 31, 1994, a final order of unconditional reinstatement shall be entered.

ATTORNEY DISCIPLINE BOARD
Tri-County Hearing Panel #15

BY:_____
Robert E. Eggenberger, Chairman

In the matter of the Reinstatement
Application of Robert A. McWhorter, ADB 92-83-RP
Petitioner

SUPPLEMENTAL REPORT OF THE TRI COUNTY HEARING PANEL # 15

Pursuant to the Order Of Remand, at a session of Wayne County Hearing Panel #15 of the Attorney Discipline Board, held at One Kennedy Square, Ste. 1910, Detroit Michigan on September 28, 1993;

Present: Robert E. Eggenberger, Chairperson
Roberta M. Hamm. Panel Member
Appearances: Susan Gilloly, ESQ .
Counsel for Grievance Administrator
Also present: Robert A. McWhorter, Petitioner

RECORD

Pursuant to the Order of Remand by the Attorney Discipline Boards this Panel was ordered to conduct an evidentiary hearing confined to the nature and scope of the petitioner's supervision by federal authorities during the period of his parole, including but not limited to the general procedures or guidelines employed by the probation office and the frequency and extent of the petitioners contact with the probation office.

The evidentiary hearing was held on September 28, 1993 and continued to October 1, 1993 due to a witnesses unavailability.

Exhibits

1. Petitioner's Exhibit 1 - Affidavit Of Robert McWhorter (on page 20, year is 1988 not 1987)

2. Respondent's Exhibit C - Letter dated September 27, 1992

3. Respondent's Exhibit D - Parole Form 1-33 March 1988)

4. Respondent's Exhibit E - Parole Form F-3 (Feb 82)

5. Respondent's Exhibit F - Probation Form 8 (Rev. 6 /91)

6. Respondent's Exhibit G - probation Form 37 (Rev. 11/91)

Petitioner's parole period was June 26, 1985 through June 28, 1992. During this time Petitioner had three parole officers. Two of the three officers testified during this proceeding. There was no specific reason as to why petitioner was assigned three different parole officers.

Petitioner's supervision included monthly meetings with his parole officer. He was also required to obtain permission for travel outside of the Western District of Michigan. At their discretion the parole officers could implement surveillance procedures, and this was done on at least one occasion. Parole officers also made infrequent visits to Petitioners's home and/or place of work. Petitioner was also required to inform his parole officer of his employment.

Included in the record are examples of the forms required to be completed during a parole period. Exhibit D is a United States Parole Form that sets forth the conditions of parole. Mere conditions are established by the United States Parole Commission or the United States District

Court. The first twelve (12) conditions listed on page two of this exhibit were applicable to Petitioner during his parole. Condition Number 13 and Special Conditions were not in writing at the time of Petitioners' parole.

Exhibit E is in the form that the parole officer was required to complete. Exhibit F is the Monthly Supervision Report that must be completed in conjunction with petitioner's monthly meeting with his parole officer. Exhibit G is the Permission to Travel form that was needed by Petitioner for travel authorization.

The record includes the testimony of Parole Officer Patricia Ann Scrutchions who supervised Petitioner from August 1988 through February 1991; and Parole Officer Ian R. Dingwall who supervised Petitioner from February 1991 to June 1992. Their testimonies set forth with more specificity Petitioner's conduct during his parole.

ROBERTA M HAMM, Vice Chairperson

Dated; December 10, 1993

Constitution of the United States

Article 1 §10
§10. Restrictions upon powers of states

Section 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

Fifth Amendment Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

14th Amendment Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they

reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Michigan Constitution of 1963

Article 6 Sec.1 Judicial power in court of justice; divisions.

The judicial power of the state is vested exclusively in one court of justice which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court, one probate court, and courts of limited jurisdiction that the legislature may establish by a two-thirds vote of the members elected to and serving in each house.

Article 6 Sec. 5 Court rules; distinctions between law and equity; master in chancery.

The supreme court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state. The distinctions between law and equity proceedings shall, as far as practicable, be abolished. The office of master in chancery is prohibited.

Article 6, Section 28 Administrative action, review

All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record. Findings of fact in workmen's compensation proceedings shall be conclusive in the absence of fraud unless otherwise provided by law.

Michigan Compiled Laws 338.41 Good moral character

Sec. 1. The phrase "good moral character", or words of similar import, when used as a requirement for an occupational or professional license in the Michigan Compiled Laws or administrative rules established thereunder shall be defined as the ability of the license applicant to serve the public in the licensed area in a fair, honest, and open manner.

Michigan Compiled Laws 338.42 Effect of prior convictions

Sec.2. A license shall not be denied solely on the basis of prior misdemeanor or felony conviction unless it is related reasonably and adversely to the ability to serve the public in the licensed area. When so used the license applicant shall be notified and shall be permitted to rebut the evidence by showing that at the current time he has the ability to, and is likely to, serve the public in a fair, honest, and open manner and that at the current time he is rehabilitated and has the ability to and is likely to serve the public in the licensed area in a fair, honest, and open manner or that the substance of the former offense is not reasonably related to the occupation or profession for which he seeks to be licensed.

Michigan Compiled Laws 338.43 Criminal records

Sec. 3. Criminal records shall not be used, distributed or disseminated in connection with the application for a permit, registration, license, or certificate: (1) records of arrest not followed by a valid conviction; (2) convictions which have been annulled or expunged; (3) misdemeanor convictions not involving moral turpitude; (4) misdemeanor convictions for which no jail sentence can be imposed.

Michigan Compiled Laws 338.44 Information as applicant's fitness

Sec. 4. Nothing in this act shall be construed to bar the use by a licensing agency in its determination of an applicant's fitness, of any other public record, not related to arrest or prosecution, or of any other source of unbiased and accurate information. MCL 338.45 Statement as to basis for denial of license; rehearing

Sec. 5. When an applicant is found to be unqualified for a license because of a lack of good moral character, or similar criteria, he shall be furnished by the board with a statement to this effect, which statement shall contain a complete record of the evidence upon which the determination was based. The applicant shall be entitled, as of right, to a rehearing on the issue, before the board if he has relevant evidence, not previously considered, regarding his qualifications.

Michigan Compiled Laws 338.46 Judicial review

Sec. 6. A license applicant, aggrieved by a licensing agency determination regarding the applicant's possession of good moral character, may, if unsatisfied by his administrative appeal, as provided in section 5, bring an action in circuit court for a review of the record. If, in the opinion of the circuit court, the record does not disclose a lack of good moral character, as defined in this act, the court shall so state and shall order the board to issue the license, when all other licensing requirements are complied with.

MCL 338.47 Discipline by licensing agencies

Sec. 7. This act does not affect the power of a licensing agency to discipline licensees under its jurisdiction for prohibited acts of professional misconduct or dishonesty.

MICHIGAN COURT RULES OF 1985

1.100 Applicability; Construction

1.101 Title; Citation

These rules are the "Michigan Court Rules of 1985". An individual rule may be referred to as "Michigan Court Rule ____", and cited by the symbol "MCR _____". For example, this rule may be cited as MCR 1.101.

1.102 Effective Date

These rules take effect on March 1, 1985. They govern all proceedings in actions brought on or after that date, and all further proceedings in actions then pending. A court may permit a pending action to proceed under the former rules if it finds that the application of these rules to that action would not be feasible or would work injustice.

1.103 Applicability

The Michigan Court Rules govern practice and procedure in all courts established by the constitution and laws of the State of Michigan. Rules stated to be applicable only in a specific court or only to a specific type of proceedings apply only to that court or to that type of proceeding and control over general rules.

1.104 Statutory Practice Provisions

Rules of practice set forth in any statute, if not in conflict with any of these rules, are effective until superseded by rules adopted by the Supreme Court

1.105 Construction

These rules are to be construed to secure the just, speedy, and economical determination of every action and to avoid the consequences or error that does not affect the substantial rights of the parties.

1.200 AMENDMENT OF MICHIGAN COURT RULES

1.201 Amendment Procedure

(A) Notice of Proposed Amendment. Before amending the Michigan Court Rules, the Supreme Court will notify the secretary of the State Bar of Michigan and the state court administrator of the proposed amendment and the manner in which comments may be made.

(B) Notice to Bar. The state bar secretary shall notify the appropriate state bar committees or sections of the proposed amendment and the manner in which comments may be made. Unless otherwise directed by the Supreme Court, the proposed amendment shall be published int he Michigan Bar Journal.

(C) Notice to Judges. The state court administrator shall notify the presidents of the Michigan Judges Association, the Michigan District Judges Association,a nd the Michigan Probate and Juvenile Court Judges Association of the proposed amendment and the manner in which comments on the proposal may be made.

(D) Need for Immediate Action. The Court may modify or dispense with the notice requirements of this rule if it determines that there is a need for immediate action.

9.100 ATTORNEY GRIEVANCE COMMISSION; ATTORNEY DISCIPLINE BOARD

9.108 Attorney Grievance Commission

(A) Authority of Commission. The Attorney Grievance Commission is the prosecution arm of the Supreme Court for discharge of its constitutional responsibility to supervise and discipline Michigan attorneys.

9.109 Grievance Administrator.

(A) Appointment. The administrator and the deputy administrator must be attorneys. The commission shall recommend one or more candidates for appointment as administrator and deputy administrator. The Supreme Court shall appoint the administrator and the deputy administrator, may terminate their appointments at any time with or without cause, and shall determine their salaries and the other terms and conditions of their employment.

(B) Powers and Duties. The administrator has the power and duty to:

(1) employ or retain attorneys, investigators, and staff with the approval of the commission;

(2) supervise the attorneys, investigators and staff;

(3) assist the public in preparing requests for investigation;

(4) maintain the commission records created as a result of these rules;

(5) investigate alleged misconduct of attorneys, including serving a request for investigation in his or her own name if necessary;

(6) prosecute complaints the commission authorizes;

(7) prosecute or defend reviews and appeals as the commission authorizes; and

(8) perform other duties provided in these rules or assigned by the commission.

9.110 Attorney Discipline Board

(A) Authority of Board. The Attorney Discipline Board is the adjudicative arm of the Supreme Court for discharge of its exclusive constitutional responsibility to supervise and discipline Michigan Attorneys.

9.111 Hearing Panels

(A) Composition; Quorum. The board must annually appoint 3 attorneys to each hearing panel and must fill a vacancy as it occurs. A hearing panel must elect a chairperson, vice-chairperson, and secretary, whose duties are the same as those officers of the board. A hearing panel must convene at the time and place designated by its chairperson or by the board. Two members constitute a quorum. A hearing panel acts by majority vote.

(B) Powers and Duties. A hearing panel shall do the following:

(1) hold a public hearing on a complaint or reinstatement petition assigned to it within 56 days after the complaint is filed with the board or the date that notice of the reinstatement petition is published. A hearing must be concluded within 91 days after it is begun, unless the board grants an extension for good cause.

(2) receive evidence and make written findings of fact.

(3) discipline and reinstate attorneys or dismiss a complaint by order, under these rules.

(4) report its actions to the board within 28 days after the conclusion of a hearing.

(5) perform other duties provided in these rules.

9.115 Hearing Panel Procedure.

(A) Rules Applicable. Except as otherwise provided in these rules, the general court rules governing practice and procedure in a nonjury civil case apply to a proceeding before a hearing panel. Pleadings must conform as nearly as practicable to the requirements of subchapter 2.100. The original of the formal complaint and all other pleadings must be filed with the board. The formal complaint must be

served on the respondent. All other pleadings must be served on the opposing party and each member of the hearing panel. Proof of service of the formal complaint may be filed at any time prior to the date of the hearing. Proof of service of all other pleadings must be filed with the original pleadings.

(B) Complaint. Except as provided by MCR 9.120, a complaint setting forth the facts of the alleged misconduct begins proceedings before a hearing panel. The administrator shall prepare the complaint, file it with the board, and serve it on the respondent and, if the respondent is a member of or is associated with a law firm, on the firm. The unwillingness of a complainant to prosecute, or a settlement between the complainant and the respondent does not itself affect the right of the administrator to proceed.

(C) Service. Service of the complaint and all subsequent pleadings and orders must be made by personal service or by registered or certified mail addressed to the person at the person's last known address. An attorney's last known address is the address on file with the state bar as required by Rule 2 of the Supreme Court Rules Concerning the State Bar of Michigan. A respondent's attorney of record must also be served, but service may be made under MCR 2.107. Service is effective at the time of mailing, and nondelivery does not affect the validity of the service.

(D) Answer.

(1) within 21 days after the complaint is served, the respondent shall file and serve a signed answer as provided in subrule (A).

(2) A default, with the same effect as a default in a civil case, may enter against a respondent who fails within the time permitted to file an answer admitting, denying, or

explaining the complaint, or asserting the grounds for failing to do so.

(E) Representation by Attorney. The respondent may be represented by an attorney, who must enter an appearance.

(F) Prehearing Procedure.

(1) Extensions. If good cause is shown, the hearing panel may grant one extension of time for filing pleadings or may grant one adjournment of a hearing. Additional requests may be granted by the board. Pending criminal or civil litigation of substantial similarity to the allegations of the complaint is not necessarily grounds for an adjournment.

(2) Motions to Disqualify.

(a) Within the time permitted to file an answer, the respondent or the administrator may move to disqualify a member of the hearing panel. The board chairperson shall decide the motion under the guidelines of MCR 2.003.

(b) The board shall assign a substitute for a disqualified member of a hearing panel. If all are disqualified, the board must reassign the complaint to another panel.

(3) Amendment of Pleadings. A pleading may not be amended except on leave granted by the board or the assigned hearing panel.

(4) Discovery. Pretrial or discovery proceedings are not permitted, except as follows:

(a) within 21 days of the service of a formal complaint, a party may demand in writing that documentary evidence that is to be introduced at the hearing by the opposing party be made available for inspection or copying. Within 14 days after service of a written demand, the documents shall be made available, provided that the

administrator need not comply prior to the filing of the respondent's answer. The respondent shall comply with the written demand within 14 days, except that the respondent need not comply until the time for filing an answer to the formal complaint has expired. Any other documentary evidence to be introduced at the hearing by either party shall be supplied to the other party no later than 14 days prior to the hearing. Any documentary evidence not so supplied shall be excluded from the hearing except for good cause shown.

(b) Within 21 days of the service of a formal complaint, a party may demand in writing that the opposing party supply written notification of the name and address of any person to be called as a witness. Within 14 days after the service of a written demand, the notification shall be supplied. However, the administrator need not comply prior to the filing of the respondent's answer to the formal complaint; in such cases, the administrator shall comply with the written demand within 14 days of the filing of the respondent's answer to the formal complaint. The respondent shall comply with the written demand within 14 days, except that the respondent need not comply until the time for filing an answer to the formal complaint has expired. Except for good cause shown a party who is required to give said notification must give supplemental notice to the adverse party within 7 days after any additional witness has been identified, and must give the supplemental notice immediately if the additional witness is identified less than 14 days before a scheduled hearing;

(c) A deposition may be taken of a witness living outside the state or physically unable to attend the hearing.

(d) The hearing panel may order a prehearing conference held before a panel member to obtain admissions

or otherwise narrow the issues presented by the pleadings. If a party fails to comply with subrule (F)(4)(a) or (b), the hearing panel or the board may, on motion and showing of material prejudice as a result of the failure, impose one or more of the sanctions set forth in MCR 2.313(B)(2)(a)-(c).

(5) Discipline by Consent. A respondent may offer to plead nolo contendere or admit all essential facts contained in the complaint or any of its allegations in exchange for a stated form of discipline and on the condition that the plea or admission and discipline agreed on is accepted by the commission and the hearing panel. If approved, the hearing panel shall enter a final order of discipline. If not approved, the offer is deemed withdrawn and statements or stipulations made in connection with the offer are inadmissible in disciplinary proceedings against the respondent and not binding on the respondent or the administrator; the matter must then be referred for hearing to a hearing panel other than the one that passed on the proposed discipline.

(G) Hearing Time and Place; Notice. The board or the chairperson of the hearing panel shall set the time and place for a hearing. Notice of a hearing must be served by the board or the chairperson of the hearing panel on the administrator, the respondent and complainant, and any attorney of record at least 21 days before the initial hearing. Unless the chairperson otherwise directs, the hearing must be in the county in which the respondent has or last had his or her office or residence. If the hearing panel fails to convene or complete its hearing within a reasonable time, the board may reassign the complaint to another panel or to a master.

(H) Respondent's Appearance. The respondent shall personally appear at the hearing and is subject to cross-examination as an opposite party under MCL 600.2161;

MSA 27A.2161. If the respondent, or the respondent's attorney on his or her behalf, claims physical or mental incapacity as a reason for the respondent's failure to appear before a hearing panel or the board, the panel or the board on its own initiative may suspend the respondent from the practice of law until further order of the panel or board. The order of suspension must be filed and served as other orders of discipline.

(I) Hearing; Contempt.

(1) A hearing panel may issue subpoenas (including subpoenas for production of documents and other tangible things), cause testimony to be taken under oath, and rule on the admissibility of evidence under the Michigan Rules of Evidence. The oath or affirmation may be administered by a panel member. A subpoena must be issued in the name and under the seal of the board. It must be signed by a panel or board member, by the administrator, or by the respondent or the respondent's attorney. A subpoenaed witness must be paid the same fee and mileage as a witness subpoenaed to testify in the circuit court. Parties must notify their own witnesses of the date, time, and place of the hearing.

(2) A person who without just cause fails or refuses to appear and give evidence as commanded by a subpoena, to be sworn or affirmed, or to answer a proper question after he or she has been ordered to do so, is in contempt. The administrator may initiate a contempt proceeding under MCR 3.606 in the circuit court for the county where the act or refusal to act occurred.

(J) Decision.

(1) The hearing panel must file separate reports of its decisions on the misconduct charges and, if applicable, the resulting discipline. The reports must include a certified

transcript, pleadings, exhibits, briefs, and findings of fact. The discipline report must also include a summary of all previous misconduct for which respondent was disciplined.

(2) Upon a finding of misconduct, the hearing panel shall conduct a separate hearing, as soon thereafter as practicable, to determine the appropriate discipline.

(3) If the hearing panel finds that he charge of misconduct is established by a preponderance of the evidence, it must enter an order of discipline to take effect 21 days after it is served on the respondent unless the panel finds good cause for the order to take effect earlier. In determining the discipline to be imposed, any and all relevant evidence of aggravation or mitigation shall be admissible, including previous admonitions and orders of discipline.

(4) If the hearing panel finds that the charge of misconduct is not established by a preponderance of the evidence, it must enter an order dismissing the complaint.

(5) The report and order must be signed by the panel chairperson and filed with the board and the administrator. A copy must be served on the parties as required by these rules.

(K) Stay of Discipline. If a discipline order is a suspension of 179 days or less, a stay of the discipline order will automatically issued on the timely filing by the respondent of a petition for review. The stay remains effective until further order of the board. The respondent may petition the board for a stay pending review or reconsideration of other discipline orders.

(L) Enforcement. The administrator and his or her legal counsel shall take the necessary steps to enforce a discipline order after it is effective.

(M) Resignation by Respondent; Admission of

Charges. An attorney's request that his or her name be stricken from the official register of attorneys may not be accepted while a request for investigation of or a complaint is pending, except pursuant to an order of revocation.

9.118 Review of Order of Hearing Panel.

(A) Review of Order; Time.

(1) The administrator, the complainant, or the respondent may petition the board in writing to review the order of the hearing panel filed under MCR 9.115(J). The petition for review must set forth the reasons and the grounds on which review is sought and must be filed with the board within 21 days after the order is served. The petitioner must serve copies of the petition on the other party and file a proof of service with the board.

(2) A cross-petition for review may be filed within 21 days after the petition for review is served on the cross-petitioner.

(3) A delayed petition for review may be considered by the board under the guidelines of MCR 7.205(F).

(B) Order to Show Cause. On timely filing of a petition for review, the board shall issue an order to show cause, at a date and time specified, why the order of the hearing panel should not be affirmed. The board must serve the order to show cause on the administrator, complainant, and respondent at least 21 days before the hearing. Failure to comply with the order to show ause, incldung but not limited to a requirement for briefs, may be grounds for dismissal of a petition for revview. Dismissal of a petition for review shall not affect the validity of a cross-petition for review.

(C) Hearing.

(1) A hearing on the order to show cause must be heard by at least 3 board members assigned by the chairperson. The board must make a final decision on consideration of the whole record, including a transcript of the presentation made to the subboard and the subboard's recommendation. The respondent shall appear personally at the review hearing unless excused by the board. Failure to appear may result in denial of any relief sought by the respondent, or any other action allowable under MCR 9.118(D).

(2) If the board believes that additional testimony should be taken, it may refer the case to a hearing panel or a master. The panel or the master shall then take the additional testimony and make a supplemental report, including a transcript of the additional testimony, pleadings, exhibits, and briefs with the board. Notice of the filing of the supplemental report and a copy of the report must be served as an original report and order of the hearing panel.

(D) Decision; Motion for Reconsideration; Stay. After the hearing on the order to show cause, the board may affirm, amend, revise, or nullify the order of the hearing panel in whole or in part or order other discipline. A discipline order is not effective until 21 days after it is served on the respondent unless the board finds good cause for the order to take effect earlier. If the board grants a stay, the stay remains effective for 21 days after the board enters its order granting or denying reconsideration.

(E) Filing Orders. The board may file a copy of its discipline order with the Supreme Court clerk and the clerk of the county where the respondent resides and where his or her office is located. The order must be served on all parties.

If the respondent requests it in writing, a dismissal order must be similarly filed and served.

9.122 Review by the Supreme Court.

(A) Kinds Available; Time for Filing.

(1) A party aggrieved, including the person who made a request for investigation, by a final order of discipline or dismissal entered by the board on review under MCR 9.118, may apply for leave to appeal to the Supreme Court under MCR 7.302 within 21 days after the order is entered. If a motion for reconsideration is filed before the board's order takes effect, the application for leave to appeal to the Supreme Court may be filed within 21 days after the board enters its order granting or denying reconsideration.

(2) If a request for investigation has been dismissed under MCR 9.112(C)(1) or 9,114(A) a party aggrieved by the dismissal may file a complaint for mandamus in the Supreme Court under MCR 7.304.

(B) Rules Applicable. Except as modified by this rule, chapter 7.300 governs an appeal.

(C) Stay of Order. If the discipline order is a suspension of 179 days or less, a stay of the order will automatically issue on the timely filing of an appeal by the respondent. The stay remains effective until conclusion of the appeal or further order of the Supreme Court. The respondent may petition the Supreme Court for a stay pending appeal of other orders of the board.

(D) Record on Appeal. The original papers constitute the record on appeal. The board shall certify the original record and file it with the Supreme Court promptly after the briefs of the parties have been filed. The record must include a list of docket entries, a transcript of testimony taken, and

all pleadings, exhibits, briefs, findings of fact, and orders in the proceeding. If the record contains material protected, the protection continues unless otherwise ordered by the Supreme Court.

(E) Disposition. The Supreme Court may make any order it deems appropriate, including dismissing the appeal. The parties may stipulate to dismiss the appeal with prejudice.

9.123 Eligibility for Reinstatement

(A) Suspension, 179 Days or Less. An attorney whose license has been suspended for 179 days or less is automatically reinstated by filing with the Supreme Court clerk, the board, and the administrator an affidavit showing that the attorney has fully complied with the terms and conditions of the suspension order. A false statement contained in the affidavit is ground for disbarment.

(B) Revocation or Suspension For More Than 179 Days. An attorney whose license to practice law has been revoked or suspended for more than 179 days is not eligible for reinstatement until the attorney has petitioned for reinstatement under MCR 9.124 and has established by clear and convincing evidence that:

(1) he or she desires in good faith to be restored to the privilege of practicing law in Michigan;

(2) the term of the suspension ordered has elapsed or 5 years have elapsed since revocation of the license;

(3) he or she has not practiced or attempted to practice law contrary to the requirement of his or her suspension or revocation;

(4) he or she has complied fully with the order of discipline;

(5) his or her conduct since the order of discipline has been exemplary and above reproach;

(6) he or she has a proper understanding of and attitude toward the standards that are imposed on members of the bar and will conduct himself or herself in conformity with those standards;

(7) taking into account the nature of the misconduct which led to the revocation or suspension, he or she nevertheless can safely be recommended to the public, the courts, and the legal profession as a person fit to be consulted by others and to represent them and otherwise act in matters of trust and confidence, and in general to aid in the administration of justice as a member of the bar and as an officer of the court;

(8) he or she is in compliance with the requirements of subrule (C), if applicable; and

(9) he or she has reimbursed the client security fund of the State Bar of Michigan or has agreed to an arrangement satisfactory to the fund to reimburse the fund for any money paid from the fund as a result of his or her conduct. Failure to fully reimburse as agreed is ground for revocation of a reinstatement.

(C) Reinstatement After Three Years. An attorney who, as a result of disciplinary proceedings, resigns, is disbarred, or is suspended for any period of time, and who does not practice law for 3 years or more, whether as the result of the period of disciplinary or voluntarily, must be recertified by the Board of Law Examiners before the attorney may be reinstated to the practice of law.

*(D) Petition for Reinstatement; Filing Limitations.

(1) An attorney whose license to practice law has been suspended may not file a petition for reinstatement

earlier than 56 days before the term of suspension ordered has fully elapsed.

(2) An attorney whose license to practice law has been revoked may not file a petition for reinstatement until 5 years have elapsed since revocation of the license.

(3) An attorney whose license to practice law has been revoked or suspended and who has been denied reinstatement may not file a new petition for reinstatement until at least 180 days from the effective date of the most recent hearing panel order granting or denying reinstatement. [Amended effective March 1, 1994; September 15, 1994.]

9.124 Procedure for Reinstatement

(A) Filing of Petition. An attorney shall file the original petition for reinstatement with the Supreme Court clerk and a copy with the commission and the board. If the petition is in proper form, the board must assign it to a hearing panel.

(B) Administrator's Responsibilities. The administrator shall investigate the petitioner's eligibility for reinstatement before a hearing on it, report his or her findings in writing to the hearing panel, and serve a copy on the petitioner. The report must summarize the facts of all previous misconduct and the available evidence bearing on the petitioner's eligibility for reinstatement. At least 28 days before the hearing, the administrator shall publish in the Michigan Bar Journal a notice briefly describing the nature and date of the discipline, the misconduct for which the petitioner was disciplined, and the matters required to be provided for reinstatement.

(C) Hearing Panel's Responsibilities. A reinstatement hearing may not be held earlier than 56 days after the

petition was served on the administrator. The proceeding on a petition for reinstatement must conform as nearly as practicable to a proceeding for hearing on a complaint. The petitioner shall appear personally for cross-examination before the hearing panel and answer fully and fairly under oath all questions on his or her eligibility for reinstatement. The hearing panel must enter an order granting or denying reinstatement or conditioning reinstatement on compliance with MCR 9.123(B)(8) or (9) and make a written report signed an certified by the chairperson, including a transcript of the testimony taken, pleadings, exhibits and briefs, and its findings of fact. The report and order must be filed an served under MCR 9.118(E).

(D) Review. Review is available under the rules governing review of other hearing panel orders.

Michigan General Court Rules of 1963
Rule 957 Attorney Grievance Commission

.1 Authority of Commission. The Attorney Grievance Commission is the prosecution arm of the Supreme Court for discharge of its constitutional responsibility to supervise and discipline Michigan attorneys.

Rule 958 Grievance Administrator.

.1 Powers and Duties. The administrator has the power and duty to:

(1) employ or retain legal counsel, investigators, and staff with the approval of the commission;

(2) supervise legal counsel, his staff and investigators;

(3) assist the public in preparing requests for investigation;

(4) maintain the commission records created as a result of these rules;

(5) investigate alleged misconduct of attorneys, including serving a request for investigation in his own name if necessary;

(6) prosecute complaints the commission authorizes;

(7) prosecute or defend reviews and appeals as the commission authorizes; and

(8) perform other duties provided in these rules or assigned by the commission.

Rule 959 Attorney Discipline Board

.1 Authority of Board. The Attorney Discipline Board is the adjudicative arm of the Supreme Court for discharge of its exclusive constitutional responsibility to supervise and discipline Michigan Attorneys.

Rule 960 Hearing Panels

.1 Composition; Quorum. The board shall annually appoint 3 attorneys to each hearing panel and shall fill a vacancy as it occurs. A hearing panel shall elect a chairperson, vice-chairperson, and secretary, whose duties are the same as those officers of the board. A hearing panel shall convene at the time and place designated by its chairperson or by the board. Two members constitute a quorum. A hearing panel acts by majority vote.

.2 Powers and Duties. A hearing panel shall:

(1) hold a public hearing on a complaint or reinstatement petition assigned to it within 60 days after the date the complaint is filed with the board or the date that notice of the reinstatement petition is published. A hearing must be concluded within 90 days after it is begun, unless

the board grants an extension for good cause shown.

(2) receive evidence and make written findings of fact;

(3) discipline and reinstate attorneys or dismiss a complaint by order, under these rules;

(4) report its actions to the board within 30 days of the conclusion of a hearing; and

(5) perform other duties provided in these rules.

Rule 964 Hearing Panel Procedure.

.1 Rules Applicable. Except as otherwise provided in these rules, the general court rules governing practice and procedure in a nonjury civil case apply to a proceeding before a hearing panel. Pleadings must conform as nearly as practicable to the requirements of the general court rules.

.2 Complaint. A complaint setting forth the facts of the alleged misconduct begins proceedings before a hearing panel. The administrator shall prepare the complaint, file it with the board, and serve it on the respondent and, if the respondent is a member of or is associated with a law firm, on the firm. The unwillingness of a complainant to prosecute or a settlement between the complainant and the respondent does not itself affect the right of the administrator to proceed.

.3 Service. Service under these rules must be made by personal service or by registered or certified mail addressed to the person at his last known address. An attorney may be served at the address he files with the state bar. A respondent's counsel of record must also be served, but service may be made under GCR 1963, 107. Service is effective at the time of mailing, and nondelivery does not affect the validity of the service.

.4 Answer.

(a) within 20 days after the complaint is served on him, the respondent shall file a signed answer with the board and serve a copy on the administrator and the hearing panel.

(b) A default, with the same effect as a default in a civil case, may enter against a respondent who fails within the time permitted to file an answer admitting, denying, or explaining the complaint, or asserting the grounds for failing to do so.

.5 Representation by Counsel. The respondent may be represented by counsel. Counsel shall enter an appearance.

.6 Prehearing Procedure.

(a) Extensions. If good cause is shown, the hearing panel may grant one extension of time for filing pleadings or may grant one adjournment of a hearing. Additional requests may be granted by the board. Pending criminal or civil litigation of substantial similarity to the allegations of the complaint does not require an adjournment.

(b) Motions to Disqualify.

(1) Within the time permitted to file an answer, the respondent or the administrator may move to disqualify a member of the hearing panel. The board chairperson shall decide the motion under the guidelines of GCR 1963, 912.

(2) The board shall assign a substitute for a disqualified member of a hearing panel. If all are disqualified, the board shall reassign the complaint to another panel.

(c) Amendment of Pleadings. A pleading may not be amended except on leave granted by the board or the assigned hearing panel.

(d) Discovery. Pretrial or discovery proceedings are not permitted, except

(1) within 15 days after the answer to the complaint is filed, the administrator shall, on the respondent's written demand, make available for inspection or copying by the respondent documentary evidence in the administrator's possession that is to be introduced as evidence at the hearing;

(2) within the same time, the administrator shall give the respondent written notification of the name and address of any person to be called as a witness. The administrator shall give supplemental notice to the respondent within 5 days after any additional witness has been identified and at least 10 days before a scheduled hearing;

(3) a deposition may be taken of a witness living outside the state or physically unable to attend the hearing;

(4) the hearing panel may order a prehearing conference held before a panel member to obtain admissions or otherwise narrow the issues presented by the pleadings.

If the administrator fails to comply with subrules 964.6(d)(1) or (2), the hearing panel or the board may on motion and showing of material prejudice as a result of the failure impose one or more of the sanctions set forth in GCR 1963, 313.2(2)(a)-(c).

(e) Discipline by Consent. A respondent may offer to plead nolo contendere or admit all essential facts contained in the complaint or any of its counts in exchange for a stated form of discipline and on the condition that the plea or admission and discipline agreed on is accepted by the commission and the hearing panel. If approved, the hearing panel shall enter a final order of discipline. If not approved, the offer is deemed withdrawn and statements or stipulations made in connection with the offer are inadmissible in disciplinary proceedings against the respondent and not

binding on the respondent or the administrator; and the matter is to be referred for hearing to a hearing panel other than the one that passed on the proposed discipline by consent.

.7 Hearing Time and Place; Notice. The chairperson of the hearing panel shall set the time and place for a hearing. Notice of a hearing must be served on the respondent and complainant at least 10 days before the hearing. Unless the chairperson otherwise directs, the hearing must be in the county in which the respondent has or last had his office or residence. If the hearing panel fails to convene or complete its hearing within a reasonable time, the board may reassign the complaint to another panel.

.8 Respondent's Appearance. The respondent shall personally appear at the hearing. He is subject to cross examination as an opposite party under MCLA 600.2161; MSA 27A.2161. If the respondent, or counsel in his behalf, claims physical or mental incapacity as a reason for the respondent's failure to appear before a hearing panel or the board, the panel or the board on its own motion may suspend the respondent from the practice of law until further order of the panel or board. The order of suspension must be filed and served as other orders of discipline.

.9 Hearing; Contempt.

(a) A hearing panel may issue subpoenas, including subpoenas duces tecum, cause testimony to be taken under oath, and rule on the admissibility of evidence under the Michigan rules of evidence. The oath or affirmation may be administered by a panel member. A subpoena must be issued in the name and under the seal of the board. It must be signed by a panel or board member, by the administrator, or by the respondent or his counsel. A subpoenaed witness must

be paid the same fee and mileage as a witness subpoenaed to testify in the circuit court.

(b) A person who without just cause fails or refuses to appear and give evidence as commanded by a subpoena, to be sworn or affirmed, or to answer a proper question after he has been ordered to do so is in contempt. The administrator may initiate a contempt proceeding under GCR 1963,760 in the circuit court for the county where the act or refusal to act occurred.

.10 Decision. The hearing panel shall file a separate report, including a certified transcript of the testimony, pleadings, exhibits, briefs, a summary of all previous misconduct for which respondent was disciplined, and its findings of fact.

(1) If the hearing panel finds that the charge of misconduct is not established by a preponderance of the evidence, it must enter an order dismissing the complaint.

(2) If the hearing panel finds that he charge of misconduct is established by a preponderance of the evidence, it must enter an order of discipline to take effect 20 days after it is served on the respondent unless the panel finds good cause for the order to earlier take effect.

The report and order must be signed by the panel chairperson and filed with the board and the administrator. A copy must be served on the parties as required by these rules.

.11 Stay of Discipline. If the respondent petitions the board for a review and a stay of the discipline order before the panel's order is effective, the discipline order does not take effect until ordered by the board.

.12 Enforcement. The administrator and his legal counsel shall take the necessary steps to enforce a discipline order after it is effective.

.13 Resignation by Respondent; Admission of Charges. An attorney's request that his name be stricken from the official register of attorneys may not be accepted while a request for investigation of his misconduct or a complaint against him is pending, unless the attorney admits the misconduct in writing or by default. The attorney's request entitles the hearing panel to find that the misconduct charge is true and to enter an order revoking his license.

Rule 967 Review of Order of Hearing Panel.

.1 Review of Order; Time. The administrator, the complainant, or the respondent may move the board in writing to review the order of the hearing panel filed under rule 964.10. The motion must set forth the reasons and the grounds on which review is sought and must be filed with the board within 20 days after the order is served.

.2 Order to Show Cause. On timely filing of a motion for review, the board shall issue an order to show cause, at a date an time specified, why the order of the hearing panel should not be affirmed. The administrator must serve the order to show cause on the administrator, complainant, and respondent at lease 20 days before the hearing.

.3 Hearing.

(a) A hearing on the order to show cause must be heard by at least 3 board members, including a lay member, assigned by the chair-person. The board must make a final decision on consideration of the whole record, including a transcript of the presentation made to the sub-board and the sub-board's recommendation.

(b) If the board believes that additional testimony should be taken, it may refer the case to a hearing panel or

a master. The panel or the master shall then take the additional testimony and make a supplemental report, including findings of fact and recommendations, and shall file the report, including a transcript of the additional testimony, pleadings, exhibits, and briefs with the board. Notice of the filing of the supplemental report and a copy of the report must be served as an original report and order of the hearing panel.

.4 Decision. After the hearing on the order to show cause, the board may affirm, amend, revise, or nullify the order of the hearing panel in whole or in part or order other discipline. A discipline order is not effective until 20 days after it is served on the respondent unless the board finds good cause for the order to earlier take effect.

.5 Filing Orders. The board may file a copy of its discipline order with the Supreme Court clerk and the clerk of the county where the respondent resides and where he had his office. The order must be served on all parties. If the respondent requests it in writing, a dismissal order must be similarly filed and served.

Rule 971 Review by the Supreme Court.

.1 Kinds Available; Time for Filing.

(a) a party aggrieved, including the person who made a request for investigation, by a final order of discipline or dismissal entered by the board on review under rule 967 may apply for leave to appeal in the Supreme Court under rule 853 within 20 days after the order is entered.

(b) If the administrator has dismissed a request for investigation under sub-rule 961.3(a) or 963.1, a party aggrieved by the dismissal may file a complaint for mandamus in the Supreme Court under sub-rule 862.5(b).

.2 Rules Applicable. Except as modified by this rule, chapter 85 governs an appeal.

.3 Stay of Order. IF the discipline order is a suspension of 120 days or less, a stay of the order will automatically issue on the timely filing of an appeal by the respondent. The stay remains effective until conclusion of the appeal or further order of the Supreme Court. The respondent may petition the Supreme Court for a stay pending appeal of other orders of the board.

.4 Record on Appeal. The original papers constitute the record on appeal. The board shall certify the original record and file it with the Supreme Court promptly after the briefs of the parties have been filed. The record must include a list of docket entries, a transcript of testimony taken, and all pleadings, exhibits, briefs, findings of fact, and orders in the proceeding. If the record contains material protected, the protection continues unless otherwise ordered by the Supreme Court.

.5 Disposition. The Supreme Court may make any order it deems appropriate, including dismissing the appeal. The parties may stipulate to dismiss the appeal with prejudice.

Rule 972 Eligibility for Reinstatement

.1 Suspension, 120 Days or Less. An attorney whose license has been suspended for 120 days or less is automatically reinstated by filing with the Supreme Court clerk and the administrator an affidavit showing that he has fully complied with the terms and conditions of the suspension order. A false statement contained in the affidavit is ground for disbarment.

.2 Revocation or Suspension For More Than 120

Days. An attorney whose license to practice law has been revoked or suspended for more than 120 days is not eligible for reinstatement until he has petitioned for reinstatement under GCR 1963, 973 and has established by clear and convincing evidence that:

(1) he desires in good faith to be restored to the privilege of practicing law in Michigan;

(2) the term of the suspension ordered has elapsed or 5 years have elapsed since revocation of the license;

(3) he has not practiced or attempted to practice law contrary to the requirement of his suspension or revocation;

(4) he has complied fully with the order of discipline;

(5) his conduct since the order of discipline has been exemplary and above reproach;

(6) he has a proper understanding of and attitude toward the standards that are imposed on members of the bar and will conduct himself in conformity with those standards;

(7) he can safely be recommended to the public, the courts, and the legal profession as a person fit to be consulted by others and to represent them and otherwise act in matters of trust and confidence, and in general to aid in the administration of justice as a member of the bar and as an officer of the court;

(8) he is in compliance with the requirements of subrule 972.3, if applicable; and

(9) he has reimbursed the client security fund of the state bar of Michigan or has agreed to an arrangement satisfactory to the fund to reimburse the fund for any money paid from the fund as a result of his conduct. Failure to fully reimburse as agreed is ground for revocation of a reinstatement.

.3 Reinstatement After Three Years. An attorney who, as a result of disciplinary proceedings, resigns, is disbarred, or is suspended for any period of time, and who does not practice law for 3 years or more, whether as the result of the period of disciplinary or voluntarily, must be recertified by the Board of Law Examiners before the attorney may be reinstated to the practice of law.

Rule GCR 973 Reinstatement

.1 Filing of Petition. An attorney must file the original petition for reinstatement with the Supreme Court clerk and a copy with the commission and the board. If the petition is in proper form, the board shall assign it to a hearing panel.

.2 The Administrator's Responsibilities. The administrator shall investigate the petitioner's eligibility for reinstatement before a hearing on it, report his findings in writing to the hearing panel, and serve a copy on the petitioner. The report must summarize the facts of all previous misconduct and the available evidence bearing on the petitioner's eligibility for reinstatement. At least 30 days before the hearing, the administrator shall publish in the State Bar Journal a notice briefly describing the nature and date of the discipline, the misconduct for which the petitioner was disciplined, and the matters required to be provided for reinstatement.

.3 The Hearing Panel's Responsibilities. A reinstatement hearing may not be held earlier than 60 days after the petition was served on the administrator. The proceeding on a petition for rein statement must conform as nearly as practicable to a proceeding for hearing on a complaint. The petitioner shall appear personally for cross-

examination before the hearing panel and answer fully and fairly under oath all questions on his eligibility for reinstatement. The hearing panel shall enter an order granting or denying reinstatement or conditioning reinstatement on compliance with subrule 972.2(8) or 972.2(9) and make a written report signed an certified by the chairperson, including a transcript of the testimony taken, pleadings, exhibits and briefs, and its findings of fact. The report and order must be filed an served under subrule 967.5.

.4 Review. Review is available under the rules governing review of other hearing panel orders.

Supreme Court, U.S.
FILED
JAN 22 1996
CLERK

No. 95-982

In The Supreme Court of the United States

October Term, 1995

ROBERT A. MCWHORTER,

Petitioner,

vs

GRIEVANCE ADMINISTRATOR,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court For The State Of Michigan

BRIEF IN OPPOSITION To The Petition For Writ Of Certiorari

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88 pp

RESTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

ISSUE I.

DOES A STATE SUPREME COURT DECISION DENYING REINSTATEMENT TO A FORMER ATTORNEY WHO WAS DISBARRED FOR SERIOUS CRIMINAL OFFENSES, WHICH PROVIDES THAT THE PETITIONER MAY NOT REAPPLY FOR REINSTATEMENT UNTIL FIVE YEARS HAVE LAPSED FROM THE EXPIRATION OF HIS PAROLE, SO AS TO ENSURE THAT AN EVALUATION OF HIS REHABILITATION WILL BE BASED UPON HIS UNSUPERVISED CONDUCT OVER A SUFFICIENT PERIOD OF TIME TO ENABLE A VALID EVALUATION, VIOLATE THE "EX POST FACTO" CLAUSE OF ART. 1, SEC. 10 OF THE UNITED STATES CONSTITUTION?

ISSUE II.

DOES A STATE SUPREME COURT DECISION DENYING REINSTATEMENT TO A FORMER ATTORNEY WHO WAS DISBARRED FOR SERIOUS CRIMINAL OFFENSES, WHICH PROVIDES THAT THE PETITIONER MAY NOT REAPPLY FOR REINSTATEMENT UNTIL FIVE YEARS HAVE LAPSED FROM THE EXPIRATION OF HIS PAROLE, SO AS TO ENSURE THAT AN EVALUATION OF HIS REHABILITATION WILL BE BASED UPON HIS UNSUPERVISED CONDUCT OVER A SUFFICIENT PERIOD OF TIME TO ENABLE A VALID EVALUATION, VIOLATE "DOUBLE JEOPARDY" PROVISIONS OF THE UNITED STATES CONSTITUTION?

ISSUE III.

DOES A STATE SUPREME COURT DECISION DENYING REINSTATEMENT TO A FORMER ATTORNEY WHO WAS DISBARRED FOR SERIOUS CRIMINAL OFFENSES, WHICH PROVIDES THAT THE PETITIONER MAY NOT REAPPLY FOR REINSTATEMENT UNTIL FIVE YEARS HAVE LAPSED FROM THE EXPIRATION OF HIS PAROLE, SO AS TO ENSURE THAT AN EVALUATION OF HIS REHABILITATION WILL BE BASED UPON HIS UNSUPERVISED CONDUCT OVER A SUFFICIENT PERIOD OF TIME TO ENABLE A VALID EVALUATION, VIOLATE THE "DUE PROCESS" CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

ISSUE IV.

DOES A STATE SUPREME COURT DECISION DENYING REINSTATEMENT TO A FORMER ATTORNEY WHO WAS DISBARRED FOR SERIOUS CRIMINAL OFFENSES, WHICH PROVIDES THAT THE PETITIONER MAY NOT REAPPLY FOR REINSTATEMENT UNTIL FIVE YEARS HAVE LAPSED FROM THE EXPIRATION OF HIS PAROLE, SO AS TO ENSURE THAT AN EVALUATION OF HIS REHABILITATION WILL BE BASED UPON HIS UNSUPERVISED CONDUCT OVER A SUFFICIENT PERIOD OF TIME TO ENABLE A VALID EVALUATION, VIOLATE THE "EQUAL PROTECTION" CLAUSE OF THE FOURTEENTH AMENDMENT?

TABLE OF CONTENTS

Page

Restatement of Questions Presented for Review i

Index of Authorities v

Statement of the Case 1

Reasons For Denying The Writ 13

I. **Petitioner Fails To Demonstrate Any Violation Of The "Ex Post Facto" Clause Of Art. 1, Sec. 10 Of The United States Constitution** 14

A. The Decision Requiring The Lapse Of Five Years From Expiration Of Parole Before A Disbarred Attorney Can Apply For Reinstatement, Imposed To Ensure A Sufficient Period Of Unsupervised Conduct Upon Which To Properly Evaluate Rehabilitation, Is A Procedural Change Which Is Not "Ex Post Facto" 15

B. Ex Post Facto Prohibitions Are Limited To Criminal Matters, And Do Not Apply To Attorney Disciplinary Proceedings 16

II. Petitioner Fails To Demonstrate Any "Double Jeopardy" Violation 17

III. Petitioner Fails To Demonstrate Any Violation Of The Fourteenth Amendment "Due Process" Clause 18

IV. Petitioner Fails To Demonstrate Any "Equal Protection" Violation 21

Relief 23

APPENDICES

A - Michigan Court Rules, Subchapter 9.100

B - Order Issued In Matter of Callanan

INDEX OF AUTHORITIES

Cases — Page

Dobbert v Florida, 432 U.S. 282, 53 L.Ed. 2d 344, 97 S.Ct. 2290 (1977) 16

Drumright v Padzieski, 436 F Supp 310 (1977) 19

Erdman v Stevens, 458 F.2d 1205 (2nd Cir, 1972) 21

Fox v Employment Security Comm., 379 Mich 579, 588, 153 NW2d 644 (1967) 23

Galvin v Press, 347 U.S. 522, 98 L.Ed 911, 74 S.Ct. 737 (1954) 17

Goesaert v Cleary, 335 US 464; 69 S Ct 198; 93 L Ed 163 (1948) 23

Grayson v Board of Accountancy, 27 Mich App 26, 31-32; 183 NW2d 424 (1970) 23

Grievance Administrator v August, 438
Mich 296 (1991) 5, 6, 17

Hunter v City of Ann Arbor, 325 F.Supp
847 (1971) 19

In re Petition For Reinstatement
Of McWhorter, 449 Mich 130, 141 (1995) 11, 21

In re Schlossberg v State Bar
Grievance Board, 388 Mich 389,
200 NW2d 219 (1972) 1

In the Matter of Grimes, 414 Mich 483,
326 N.W.2d 380 (1982) 14, 18

Massachusetts v Feeny, 442 U.S. 256,
99 S.Ct. 2282, 60 L.Ed.2d 870 (1979) 22

Matter of Callanan, 440 Mich 1207,
487 NW2d 750 (1992) 21, 22

Matter of Leifer, 63 AD2d 174, 177 18

Matter of Seraphim, 97 Wis 2d 485,
294 NW 2d 485 (1980) 18

Matthews v Eldridge, 424 U.S. 319,
96 S.Ct. 893, 47 L.Ed.2d 18 (1976) 19

Middlesex County Ethics Committee
v Garden State Bar Association,
et al. 457 U.S. 423, 102 S.Ct. 2515,
73 L.Ed.2d 116 (1982) 14

Miller v Florida, 482 U.S. 423, 107
S.Ct. 2446, 96 L.Ed.2d 3541 (1987) 16

Moity v Louisiana State Bar Association,
et al., 414 Fed Supp 180 (E.D. LA, 1976) 17

People v Chapman, 301 Mich 584,
601 (1942) 17

People v Potts, 181 Mich App 311,
448 NW2d 820 (1989) 16

Schware v Board of Bar Examiners
of The State Of New Mexico, 353 U.S. 232,
77 S.Ct. 752, 1 L.Ed.2d 796 (1957) 19

State Bar Grievance Administrator v Estes, 390 Mich 585, 212 NW2d 903, 92 ALR 275 (1972) 6

State Bar v McWhorter (On Reh), 407 Mich 278 (1979) 6

Struble v DAIIE, 86 Mich App 245, 272 NW2d 617 (1978) 22

United States v Halper, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989) 18

United States v McWhorter, 705 F2d 459 (6th Cir. 1982) 7

Court Rules **Page**

MCR 1.201 12

MCR 7.302(A) 5

MCR 7.302(B)(6) 5

MCR 7.302(D) 6

MCR 7.302(F)(1) 6

MCR 7.306 6

MCR 7.312(A) 6

MCR 9.103(A) 14

MCR 9.105 18

MCR 9.107 2

MCR 9.107(A) 21

MCR 9.108(A)&(B) 2

MCR 9.109(A)&(B) 2

MCR 9.110(A)&(B) 2

MCR 9.111(A) 2

MCR 9.111(B) 3

MCR 9.115(A) 4

MCR 9.115(E) 4

MCR 9.115(F)(2) 4

MCR 9.115(I) 4

MCR 9.118(A) 4

MCR 9.118(B) 5

MCR 9.118(C)(1) 5

MCR 9.118(C)(2) 5

MCR 9.118(D) 5

MCR 9.122(A)(1) 5

MCR 9.123 . . . . . 11, 14

MCR 9.123(B) 8, 9, 22, 23

MCR 9.123(B)(1)-(9) 3

MCR 9.123(B)(6) 8, 10, 12, 15, 21, 22

MCR 9.123(B)(7) 8, 10, 12, 15, 21, 22

MCR 9.123(B)(8) 4

MCR 9.123(C) 4

MCR 9.123(D)(2) 2

MCR 9.124(A)&(B) 2

MCR 9.124(C) 2

MCR 9.124(C)&(D) 2

MCR 9.124(D) 4

MCR 9.124(E) 4

Subchapter 9.100 1

STATEMENT OF THE CASE

This case involves the decision of a state supreme court denying reinstatement of a law license to a former attorney who was disbarred after being convicted of serious criminal offenses in both state and federal courts. The state disciplinary rules provide that a former attorney petitioning for reinstatement must prove by clear and convincing evidence that he or she meets specific criteria relating to his or her fitness to practice law. Even though a hearing panel determined that the petitioner met those criteria, the court concluded that not enough time had passed since the petitioner had been released from parole supervision in order to properly evaluate his rehabilitation. Determining that the seriousness of the misconduct which led to disbarment required an examination of this petitioner's conduct over a substantial period of time when he was not subject to parole supervision, the court further held that he could not reapply for reinstatement until five years after his release from parole. The disbarred attorney asserts that the state court violated his various rights under the United States Constitution by denying him readmission and by prohibiting him from reapplying until five years after the termination of his parole.

Michigan Reinstatement Procedures

Article 6, Section 5 of the Michigan Constitution of 1963 empowers the Supreme Court to promulgate general rules which establish, modify, amend and simplify the practice and procedure in all courts of this state. Pursuant to that authority, the Michigan Supreme Court has established rules to regulate and discipline members of the bar. In re Schlossberg v State Bar Grievance Board, 388 Mich 389, 200 NW2d 219 (1972). Rules concerning the investigation, prosecution and adjudication of allegations of misconduct, and the reinstatement to good standing after a suspension or disbarment, are set out in Subchapter 9.100 of the Michigan Court Rules (hereinafter, "MCR".) (Appendix

A). These rules are exclusive on attorney discipline matters. MCR 9.107.

Michigan has a bifurcated disciplinary system, with a separation between the prosecutorial and adjudicative functions. The Supreme Court appoints an Attorney Grievance Commission, which serves as its prosecution arm for discharge of its constitutional responsibility to supervise and discipline Michigan Attorneys. MCR 9.108(A)&(B). It also appoints a separate Attorney Discipline Board, which serves as the Court's adjudicative arm for its exclusive constitutional responsibility to supervise and discipline state attorneys. MCR 9.110(A)&(B).

A Grievance Administrator is appointed by the Supreme Court, and is empowered by the rules to investigate allegations of attorney misconduct, and to prosecute complaints authorized by the Attorney Grievance Commission within the disciplinary system. MCR 9.109(A)&(B). When a disbarred attorney petitions for reinstatement, the Grievance Administrator is required to investigate the petitioner's eligibility for reinstatement, and to report the findings in writing. MCR 9.124(C). The Grievance Administrator must also appear at the public hearing on the petition, and shall cross-examine the petitioner and present evidence bearing on his or her eligibility for reinstatement. MCR 9.124(C)&(D).

A disbarred attorney seeking reinstatement begins the process by a filing a petition and a personal history affidavit with the Supreme Court. MCR 9.124(A)&(B). A disbarred attorney may not file such a petition until five years have elapsed since revocation of the license. MCR 9.123(D)(2). If the petition and affidavit are facially sufficient, the matter is assigned to a hearing panel for adjudication. A hearing panel is composed of three attorneys, appointed by the Attorney Discipline Board. MCR 9.111(A). The hearing panel conducts a public hearing on the petition, and receives evidence relevant to the petitioner's eligibility for

reinstatement. MCR 9.111(B).

The ultimate issue adjudicated by the hearing panel is the petitioner's eligibility for reinstatement. The burden is on the petitioner to prove that he or she is fit to practice law in this state. The petitioner must establish, by clear and convincing evidence, that he or she meets all the criteria for reinstatement set forth in MCR 9.123(B)(1)-(9). That rule provides that the petitioner may be reinstated only if the evidence proves:

> (1) he or she desires in good faith to be restored to the privilege of practicing law in Michigan;
>
> (2) the term of the suspension ordered has elapsed or 5 years have elapsed since revocation of the license;
>
> (3) he or she has not practiced or attempted to practice law contrary to the requirement of his or her suspension;
>
> (4) he or she has complied fully with the order of discipline;
>
> (5) his or her conduct since the order of discipline has been exemplary and above reproach;
>
> (6) he or she has a proper understanding of and attitude toward the standards that are imposed on members of the bar and will conduct himself or herself in conformity with those standards;
>
> (7) taking into account the nature of the misconduct which led to the revocation or suspension, he or she nevertheless can safely be recommended to the public, the courts, and the legal profession as a person fit to be consulted by others and to represent them and

> otherwise act in matters of trust and confidence, and in general to aid in the administration of justice as a member of the bar and as an officer of the court;
>
> (8) he or she is in compliance with the requirements of subrule (C), if applicable; and
>
> (9) he or she has reimbursed the client security fund of the State Bar of Michigan or has agreed to an arrangement satisfactory to the fund to reimburse the fund for any money paid from the fund as a result of his or her conduct. Failure to fully reimburse as agreed is ground for revocation of a reinstatement.

The subrule (C) referred to in MCR 9.123(B)(8) requires that a disbarred attorney must be recertified by the Michigan Board of Law Examiners before he or she may be reinstated to the practice of law. MCR 9.123(C).

Proceedings before the hearing panel are generally controlled by the rules governing practice and procedure in a nonjury civil action, and the Michigan Rules of Evidence apply. MCR 9.124(D); MCR 9.115(A). A petitioner is entitled to a plethora of procedural protections, including a method to seek disqualification of a panel member, a right to be represented by counsel, and a right to obtain process for the appearance of witnesses and production of documents. MCR 9.115(F)(2); MCR 9.115(E); MCR 9.115(I). After considering the evidence, the panel must enter an order granting or denying reinstatement and a written report which includes its findings of fact. MCR 9.124(D).

Both the Grievance Administrator and the petitioner have a right to appeal the hearing panel order to the Attorney Discipline Board. MCR 9.124(E); MCR 9.118(A). An appeal begins with a petition for review, which must be

filed within 21 days after the order is served. Upon timely filing of a petition for review, the Attorney Discipline Board issues an order to show cause, at a date and time specified, why the hearing panel order should not be affirmed. MCR 9.118(B). The order to show cause also establishes a briefing schedule for the parties.

The parties to the appeal must appear for oral argument. While the rules require only that such appeals are heard by a subboard of at least three members, the full Attorney Discipline Board routinely sits en banc to hear and decide appeals of hearing panel orders. MCR 9.118(C)(1). If the Attorney Discipline Board believes that additional testimony should be taken, it may refer the matter to a hearing panel or a master. The hearing panel or master must then develop an additional record and make a supplemental report. MCR 9.118(C)(2).

After such a review hearing, the Attorney Discipline Board may affirm, amend, reverse, or nullify the hearing panel order, in whole or in part, or may order other discipline. MCR 9.118(D). The final decision must be made on consideration of the whole record. MCR 9.118(C)(1). The Attorney Discipline Board reviews the hearing panel's decision for proper evidentiary support on the whole record, but it possesses a measure of discretion with regard to its ultimate decision. Grievance Administrator v August, 438 Mich 296 (1991).

A party aggrieved by a final order of the Attorney Discipline Board on the issue of reinstatement may apply for leave to appeal to the Michigan Supreme Court. MCR 9.122(A)(1). An application must include a written argument in support of the appellant's position on each question presented for review. MCR 7.302(A). Such an application must demonstrate that the decision of the Attorney Discipline Board is erroneous and will cause material injustice. MCR 7.302(B)(6). The adverse party may file an opposing brief, but there is no oral argument on

the application. MCR 7.302(D); MCR 7.302(F)(1). Review by the Supreme Court is discretionary. The Court may grant or deny the application, enter a final decision, or issue a peremptory order. MCR 7.302(F)(1). When an application for leave to appeal is granted, the parties may file briefs and appear before the court for oral argument. MCR 7.312(A); MCR 7.306.

When reviewing a decision of the Attorney Discipline Board, the Supreme Court determines whether the board's findings have proper evidentiary support on the whole record. State Bar Grievance Administrator v Estes, 390 Mich 585, 212 NW2d 903, 92 ALR 275 (1972). However, the Court remains mindful that the power to regulate and discipline members of the bar rests ultimately with it pursuant to the constitutional mandate. Grievance Administrator v August, supra, at 304.

The rules now provide for filing limitations on petitions for reinstatement. Effective March 1, 1994, a disbarred attorney who has been denied reinstatement may not file a new petition until at least 180 days from the effective date of the most recent hearing panel order granting or denying reinstatement.

Summary of Proceedings Below

Former Michigan attorney Robert A. McWhorter (hereinafter, "Petitioner") was disbarred as a result of a drug-related felony conviction in the United States District Court for the Western District of Michigan. He appealed that conviction to the United States Circuit Court for the 6th Circuit. While the appeal was pending, action continued on another non-related disciplinary proceeding. Petitioner was ultimately suspended from the practice of law for 121 days effective October 29, 1979 for misconduct in dealing with the funds of a client. The suspension became effective upon the denial of his appeal by the Michigan Supreme Court. State Bar v McWhorter (On Reh), 407 Mich 278 (1979).

On May 29, 1980, Petitioner was convicted in state court of the felonies of kidnapping and conspiracy to forcibly seize and kidnap another with the intent to extort money. The state court convictions pertained to incidents and charges different from the drug-related federal conviction. As a result of these state convictions, additional disciplinary proceedings were instituted.

The Sixth Circuit Court of Appeals ultimately granted Petitioner's appeal of the federal conviction, and remanded the matter back to the District Court for trial. As a result of this reversal, the Attorney Discipline Board entered an order on September 9, 1980 which vacated the disbarment. However, Petitioner was not reinstated to the practice of law upon the entry of the order vacating revocation. Under the procedures then in effect, an attorney suspended for more than 120 days could not be restored to good standing until he or she petitioned for reinstatement and established his or her fitness to practice law. GCR 1963, 972.2; GCR 1963, 973. Even though the disbarrment resulting from the federal conviction was vacated, Petitioner remained ineligible to practice because of the suspension for mishandling client funds which became effective on October 29, 1979.

Petitioner's law license was again revoked, effective February 24, 1981, as a result of his state felony convictions. Meanwhile, the federal charges came back before the United States District Court for trial. Petitioner was then convicted of conspiracy to import cocaine, unlawful manufacture of methamphetamine and conspiracy to distribute methamphetamine. A second appeal to the Sixth Circuit was unsuccessful, and these federal convictions were affirmed on October 29, 1982. United States v McWhorter, 705 F2d 459 (6th Cir. 1982). Because Petitioner's law license was already revoked as a result of the state convictions, no additional disciplinary proceedings were instituted after the federal convictions.

Petitioner was sentenced on the federal conviction to

ten years imprisonment with a special two year parole term. The state convictions resulted in a consecutive sentence, with Petitioner serving his entire incarceration within federal facilities.

On April 6, 1992, after Petitioner was released from incarceration, but while he was still on parole, he petitioned for reinstatement to the practice of law. Because more than five years had lapsed since his disbarment, and his petition and affidavit were facially sufficient, the Attorney Discipline Board assigned the matter to Tri-County Hearing Panel #15 for adjudication.

Public hearings were held on four separate dates between August 12, 1992 and November 9, 1992. During the period while the matter remained pending before the panel, Petitioner was released from federal parole. His parole expired on June 28, 1992.

The panel issued a report and Conditional Order Of Reinstatement on April 7, 1993. In a 2-1 split, the hearing panel found that Petitioner had established by clear and convincing evidence the criteria for reinstatement set out at MCR 9.123(B). Among the conditions imposed by the panel were that Petitioner pay costs, pay dues to the State Bar of Michigan, be recertified by the Michigan Board of Law Examiners, and that he be monitored for a period of no less than one year to ensure continuation of weekly therapy sessions and church activity. In a sharply worded dissent, one panel member expressed her belief that the criteria of MCR 9.123(B)(6) and MCR 9.123(B)(7) had not been met. The dissenter actually concurred with the findings of the majority on all but these two criteria. She was not satisfied that Petitioner had established, by clear and convincing evidence, that he could be safely recommended to the public, the courts and the legal profession as a person fit to be consulted by others and to represent them and otherwise act in matters of trust and confidence, and in general to aid in the administration of justice as a member of the bar and

officer of the court. Likewise, she did not believe that Petitioner established, by clear and convincing evidence, that he had a proper understanding of, and attitude toward, the standards that are imposed on members of the bar.

The Grievance Administrator appealed the reinstatement to the Attorney Discipline Board, and Petitioner filed a cross-appeal seeking the elimination of the conditions imposed by the panel. The Attorney Discipline Board issued an order requiring the parties to appear on May 6, 1993 to show cause why the reinstatement with conditions should not be affirmed. Prior to the scheduled hearing date, the Attorney Discipline Board, sua sponte, remanded the matter back to Tri-County Hearing Panel #15 to develop a record as to the nature and scope of Petitioner's supervision by federal authorities during the period of parole. The hearing panel took testimony on the question, and issued a supplemental report on December 13, 1993.

On May 20, 1994, the Attorney Discipline Board entered an Order Modifying Hearing Panel Order Of Reinstatement and a Board Opinion. The Board therein affirmed Petitioner's reinstatement, but vacated the conditions calling for continued therapy and church activity and monitoring of these requirements. In the Opinion, the Board stated that it decided the matter by balancing the standards previously enunciated by the Supreme Court. The Attorney Discipline Board thus reviewed the hearing panel's findings for proper evidentiary support, recognized the element of subjective judgment which is applicable to MCR 9.123(B), and exercised the measure of discretion granted to it by the Court in regard to its ultimate decision. The Board determined that under this standard of review the decision to reinstate Petitioner should be affirmed.

On June 4, 1994, the Grievance Administrator filed an application seeking leave to appeal the reinstatement with the Michigan Supreme Court, and requested that the reinstatement order be stayed pending the appeal. The Court

granted the request for a stay on August 24, 1994.

The Supreme Court granted the Grievance Administrator's application for leave to appeal, thus consenting to a discretionary review of the reinstatement, on October 19, 1994. The parties submitted briefs on the merits, and then appeared before the Court for oral argument on March 8, 1995. The Grievance Administrator argued both that the serious nature of the misconduct justified permanent disbarment and that an insufficient time had lapsed since Petitioner's release from parole to properly adjudge his fitness to practice law.

On July 5, 1995, a divided Court issued an opinion which reversed the Attorney Discipline Board and the hearing panel. The Court determined that the petition for reinstatement must be denied, and that petitioner may not reapply for reinstatement until June 28, 1997, five years from the date of his release from federal parole. Writing for the court, Chief Justice Brickley stated that after reviewing the decisions of the hearing panel and the Attorney Discipline Board to determine if they were supported by the record as a whole, the Court found that there was a lack of evidentiary support for the conclusions that Petitioner had established the eligibility requirements of MCR 9.123(B)(6) and MCR 9.123(B)(7) by clear and convincing evidence.

The basis for this decision was that Petitioner simply had not spent enough time outside of parole supervision to enable a valid evaluation of his rehabilitation. As Justice Brickley phrased it:

> Although in these proceedings the nature and scope of supervision may be relevant, the mere fact that petitioner had not been away from the supervision of parole authorities greatly influences the determination whether he has sincerely and sufficiently demonstrated that he will be able to understand and operate within the standards of the bar. Therefore, it

> is only after a petitioner has spent sufficient time outside the control of parole officers that the hearing panel or the Attorney Discipline Board is able to determine whether the petitioner has been rehabilitated and may safely therefore be recommended for reinstatement. In re Petition For Reinstatement Of McWhorter, 449 Mich 130, 141 (1995).

The ruling that a valid evaluation of rehabilitation cannot be made until a disbarred attorney spends a sufficient time outside parole supervision begs the question as to what period of time is sufficient to enable a true evaluation. Recognizing that such a valid question arises from the decision, the Chief Justice went on to write:

> To prevent the petitioner's immediate reapplication in the present case, we hold that petitioner is not eligible for reinstatement until June 28, 1997, five years from the date of his release from federal parole. We borrow this time span from MCR 9.123 and analogize it to the present case. For the same reasons, five years is the minimum period after which a disbarred attorney may be eligible for reinstatement, we would hold that it is a sufficient period outside the supervision of parole authorities and the contemplation of petition for reinstatement to fully evaluate his fitness to practice law. In re Petition For Reinstatement Of McWhorter, supra, at 142.

While only Justice Mallet joined with the Chief Justice in the Court's Opinion, the concurring opinions of other justices make it clear that a strong majority of the court accepts the ruling that a minimum five year period after release from parole supervision is necessary in order to properly evaluate the rehabilitation of an attorney who was

disbarred for serious criminal conduct. Justice Weaver concurred in the result reached by the lead opinion that Petitioner should not be reinstated at this time, but she wrote separately to express her view that he should be permanently disbarred, with no opportunity to ever reapply for reinstatement. Justice Riley, joined by Justice Boyle, wrote a separate concurring opinion which agreed with Justice Weaver's assessment that the record calls for Petitioner's permanent disbarment. However, recognizing that a majority of the Court does not accept the proposition that there should be "permanent" disbarment, Justices Riley and Boyle accept the imposition of a five year waiting period following release from parole.

Justice Cavanaugh concurred in the holding that Petitioner has not spent enough time outside of parole supervision to adequately demonstrate his eligibility for reinstatement under MCR 9.123(B)(6) and MCR 9.123(B)(7), but he disagreed with using a published opinion as the vehicle to set the five year minimum spacing for reapplication. He stated that he doesn't necessarily disagree with the five year ban, but rather believed that the proper way to impose such a new rule is by amending the court rules after notice and opportunity to comment in the manner provided in MCR 1.201.

Only Justice Levin dissented from the decision that Petitioner should be denied reinstatement at this time. Justice Levin would uphold the decision of the Attorney Discipline Board, believing that sufficient time has elapsed since Petitioner's offense and release from incarceration to determine his moral fitness to practice law.

In a timely manner after the issuance of this published opinion, Petitioner requested the Michigan Supreme Court's reconsideration on this matter. In his motion for rehearing, Petitioner asserted the constitutional issues of "due process", "equal protection", "ex post facto", and "double jeopardy". On September 19, 1995, the

Michigan Supreme Court denied rehearing by a 4-3 vote.

REASONS FOR DENYING THE WRIT

States have an important interest in, and have traditionally exercised extensive control over, the conduct of attorneys. Middlesex County Ethics Committee v Garden State Bar Association, et al. 457 U.S. 423, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982). The Michigan Supreme Court has recognized its ability to license attorneys and regulate their practice as a valid exercise of the state's police power. In the Matter of Grimes, 414 Mich 483, 326 N.W.2d 380 (1982). The Court recognizes that the license to practice law is a continuing proclamation by the Supreme Court that the holder is fit to be entrusted with professional and judicial matters and to aid in the administration of justice. MCR 9.103(A). In order to ensure that a previously disbarred attorney is fit to resume the practice of law, the Court has promulgated rules covering the criteria for reinstatement. MCR 9.123. Among such criteria are that the person seeking reinstatement establish, by clear and convincing evidence, that:

> (6) he or she has a proper understanding of and attitude toward the standards that are imposed on members of the bar and will conduct himself or herself in conformity with those standards; and
>
> (7) taking into account the nature of the misconduct which led to the revocation or suspension, he or she nevertheless can safely be recommended to the public, the courts, and the legal profession as a person fit to be consulted by others and to represent them and otherwise act in matters of trust or confidence, and in general to aid in the administration of justice as a member of the

bar and officer of the court.

In Grievance Administrator v August, supra, the Michigan Supreme Court recognized that both the nature of the conduct for which an attorney was disbarred and the passage of time since disbarment are appropriate considerations when deciding if the person should be reinstated. The court expressly held that a disbarred attorney may be denied reinstatement on the grounds that sufficient time has not passed to determine the present fitness of the applicant for readmission, but such a denial should not be deemed a permanent disbarment.

In the present case, the Court clarified this prior holding by announcing a rule that when an attorney who was disbarred for serious criminal misconduct seeks reinstatement, a minimum period of five years from the expiration of parole supervision is necessary to make a valid evaluation of his or her eligibility under MCR 9.123(B)(6) and MCR 9.123(B)(7). The Court's holding does not change the criteria for reinstatement. It simply gives guidance on what minimum period of time outside of parole supervision is necessary to make a valid determination of sincere rehabilitation under the established criteria for reinstatement.

The holding in the case under review concerns the legitimate state interest of regulating members of the bar, and it does not violate Petitioner's rights under any provision of the United States Constitution.

I. Petitioner Fails To Demonstrate Any Violation Of The "Ex Post Facto" Clause Of Art. 1, Sec. 10 Of The United States Constituion.

Petitioner claims that the Michigan Supreme Court ruling which prohibits him from reapplying for reinstatement to the practice of law until five years after the expiration of his federal parole violates the constitutional prohibition on ex post facto laws. Such a claim is frivolous and completely

without merit. An ex post facto law is one which: (1) punishes as a crime an act previously committed, which was innocent when done; or (2) which makes more burdensome punishment for a crime after its commission; or (3) which deprives one charged with crime of any defense available according to law at time when the act was committed. Dobbert v Florida, 432 U.S. 282, 53 L.Ed. 2d 344, 97 S.Ct. 2290 (1977), reh den 434 U.S. 882, 54 L.Ed. 2d 166, 98 S. Ct. 246. Here Petitioner claims that the decision retroactively increases the penalty for his criminal acts, and thus makes more burdensome the punishment previously imposed upon him. Analysis shows that this argument is not supported in law. The decision of the Michigan Supreme Court simply presents a procedural change, and is thus not ex post facto. Furthermore, ex post facto prohibitions are limited to criminal matters, and do not apply to attorney discipline proceedings.

A. The Decision Requiring The Lapse Of Five Years From Expiration Of Parole Before A Disbarred Attorney Can Apply For Reinstatement, Imposed To Ensure A Sufficient Period Of Unsupervised Conduct Upon Which To Properly Evaluate Rehabilitation, Is A Procedural Change Which Is Not "Ex Post Facto".

The "ex post facto" prohibition applies to substantive matters, not to modes of procedure. Miller v Florida, 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed.2d 3541 (1987), People v Potts, 181 Mich App 311, 448 NW2d 820 (1989). Even though it may work to the disadvantage of a person, a procedural change is not "ex post facto." Dobbert v Florida, supra at 432 U.S. 293.

In the present case, any change imposed by the Court was clearly procedural. The holding simply alters the method by which it is determined whether a disbarred attorney has demonstrated fitness to be reinstated to the

practice of law. The sanction imposed on Petitioner for his serious misconduct was the revocation of his license to practice law, and there was no change in the quantum of discipline attached to his misconduct. Even prior to the decision in the present case, there was no automatic reinstatement after any specified period of time. Grievance Administrator v August, supra.

B. Ex Post Facto Prohibitions Are Limited To Criminal Matters, And Do Not Apply To Attorney Disciplinary Proceedings.

The phrase "ex post facto" is one that relates exclusively to criminal or penal statutes. Galvin v Press, 347 U.S. 522, 98 L.Ed 911, 74 S.Ct. 737 (1954), reh den 348 U.S. 852, 99 L.Ed. 671, 75 S.Ct. 17. As the Michigan Supreme Court stated, quoting 11 Am. Jur. P. 1179, § 351, in People v Chapman, 301 Mich 584, 601 (1942):

> 'The expression ex post facto laws is a technical one which was in use long before the Revolution and had acquired an appropriate meaning by legislators, lawyers, and authors. The phrase is one which relates exclusively to criminal or penal statutes.
>
> A statute providing for the restraint and care of the criminally insane, which was enacted after the commission of the crime, is not ex post facto because such a statute is not a criminal act, but rather one prescribing the treatment of insane persons.'

For the same reason, the decision of the Michigan Supreme Court cannot be "ex post facto". The decision concerns the criteria for reinstatement to the practice of law after a disbarment. Even though Petitioner's disbarment resulted from criminal acts, the holding of the Court does

not impose any "criminal" rule.

Several jurisdictions have expressly recognized that the ex post facto limitations do not apply to disciplinary proceedings because they are not penal in nature. Moity v Louisiana State Bar Association, et al., 414 Fed Supp 180 (E.D. LA, 1976); Matter of Seraphim, 97 Wis 2d 485, 294 NW 2d 485 (1980). As was stated in Matter of Leifer, 63 AD2d 174, 177, "It is well settled that ex post facto prohibitions are limited to criminal matters and that attorney disciplinary proceedings and sanctions are not criminal in nature."

In Michigan, the purpose of disciplinary proceedings is to protect the courts, the public and the legal profession. MCR 9.105. Disciplinary matters are not penal in nature, as the purpose of discipline cannot be punishment. Matter of Grimes, 414 Mich 483, 326 NW2d 380 (1982). Because Michigan attorney discipline proceedings, and the sanctions imposed after such proceedings, are not criminal in nature, the ex post facto prohibitions do not apply.

II. Petitioner Fails To Demonstrate Any "Double Jeopardy" Violation.

Petitioner alleges that the decision of the Michigan Supreme Court violates the "double jeopardy" clause because it constitutes a punishment and is not remedial in nature. However, he fails to indicate or explain how the decision twice puts him in jeopardy of life or limb.

The decision which denies him reinstatement to the practice of law imposes no new or additional sanction. Petitioner was disbarred in 1981. The decision does not change any conditions of his disbarment. Since the initial disbarment, Petitioner has always been subject to reinstatement criteria which would require him to establish, by clear and convincing evidence, that he is fit to resume the practice of law. The only change brought about by this opinion is a procedure intended to ensure that any decision

as to whether Petitioner has met the reinstatement criteria is based upon a valid foundation.

Petitioner's reliance on United States v Halper, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989) is totally misplaced. There is simply no rational basis to conclude that the intent or the effect of the new rule is to impose a "civil penalty" within the scope of that decision. The ultimate purpose of reinstatement proceedings is to ensure that a previously disbarred attorney seeking reinsatement to the practice of law meets the high standards expected of an attorney. It is not a device to inflict any further sanction on Petitioner for his prior transgressions.

III. Petitioner Fails To Demonstrate Any Violation Of The Fourteenth Amendment "Due Process" Clause.

"Due process" is not a technical concept with fixed requirements unrelated to time, place and circumstance. Rather it is a fexible concept, that calls for such procedural protections as a particular situation demands. Matthews v Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). The requirements of due process depend on the nature of the proceeding and the character of the rights affected. Hunter v City of Ann Arbor, 325 F.Supp 847 (1971). Even where "due process" is mandated, a question remains as to what process is due. Drumright v Padzieski, 436 F Supp 310 (1977).

It has been recognized that a state cannot exclude a person from the practice of law in a manner, or for such reasons, that contravene the "due process" clause of the Fourteenth Amendment. Schware v Board of Bar Examiners of The State Of New Mexico, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957). However, "due process" requirements are met when there is a valid basis for a finding that an applicant fails to meet the criteria required to hold a license to practice law. As the Court stated in Schware v Board of Bar Examiners of The State Of New

Mexico, supra at 353 U.S. 240,

> A state can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law....Even in applying permissible standards, officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory.

In the present case, the Michigan Supreme Court determined that five years must lapse from the expiration of Petitioner's parole before he can reapply for reinstatement of his law license. This requirement clearly has a rational connection with Petitioner's fitness to practice law. A disbarred attorney must prove his or her fitness to be reinstated by clear and convincing evidence. The Court is simply recognizing that a person's true character might not be discerned from his or her conduct while subject to even token supervision by parole authorities. As the dissenting hearing panel member put it in the report:

> In addition, although the requisite five years for application of reinstatement have passed, petitioner was only released from parole on June 28, 1992. One must question whether petitioner's exemplary behavior has been due to his supervised living under parole or has he really been rehabilitated to the high level with which attorneys are held.

By imposing this five year requirement, the Michigan Supreme Court is only seeking to ensure that any decision as to whether an applicant for reinstatement has been truly rehabilitated is based on a proper foundation.

Contrary to Petitioner's assertions, the Michigan Supreme Court did not conduct a de novo hearing on the question as to whether Petitioner met the criteria for reinstatement. Rather, it reviewed the decisions of the Attorney Discipline Board and the hearing panel for proper evidentiary support on the whole record. Here the Court expressly held that there was a lack of evidentiary support for the findings that Petitioner established the reinstatement criteria of MCR 9.123(B)(6) and MCR 9.123(B)(7). Such a finding was based on the rational conclusion that Petitioner had not spent enough time outside of parole supervision to enable anyone to make a valid determination of his rehabilitation. As the Court clearly stated,

> We believe that a review of the entire record does not support the decision of the hearing panel or the Attorney Discipline Board to reinstate Petitioner Robert McWhorter to the practice of law in this state at this time. In re Petition for Reinstatement of Robert A. McWhorter, supra, at 132.

Petitioner's arguments that the Court's alleged noncompliance with legislative enactments constitutes a denial of due process is similarly not persuasive. The statutes cited by Petitioner, Michigan Compiled Laws 338.41 - 338.47, pertain only to those occupations and professions regulated by the executive branch of government. The Michigan Court Rules are exclusive on matters pertaining to attorney discipline. MCR 9.107(A). Attorney disciplinary proceedings are judicial in nature, and the power to discipline, like the power to admit an applicant to membership in the bar, rests exclusively within the judicial branch. Erdman v Stevens, 458 F.2d 1205 (2nd Cir, 1972).

IV. Petitioner Fails To Demonstrate Any "Equal Protection" Violation.

Petitioner asserts that he has been denied equal

protection of law because other similarly situated disbarred attorneys have not been refused reinstatement because of their "supervision status." As an example of the lack "equal treatment", Petitioner points to the decision reached in Matter of Callanan, 440 Mich 1207, 487 NW2d 750 (1992). He argues that the fact that the disbarred attorney in that case immediately reapplied for reinstatement after a denial of that application, and was actually reinstated although he had not spent five years outside parole supervision, demonstrates an "equal protection" violation. This argument has no merit.

First of all, it must be recognized that Petitioner was denied reinstatement because the record did not establish by clear and convincing evidence that he met the criteria of MCR 9.123(B)(6) and MCR 9.123(B)(7). All disbarred attorneys must meet the requirements of all the criteria set forth in MCR 9.123(B) before being reinstated to the practice of law. The only difference between Petitioner and other disbarred attorneys is that the Supreme Court's holding provides a method for deterimining whether this former attorney, who was disbarred for serious criminal misconduct, has spent an adequate amount of "unsupervised" time to enable a proper evaluation of his rehabilitation. Such a distinction has a rational basis.

Furthermore, Petitioner's reliance on the reinstatement of the disbarred attorney discussed in Matter of Callanan, supra, to demonstrate the lack of "equal protection" is completely misleading. While Mr. Callanan has been reinstated, the Grievance Administrator is appealing that reinstatement on the same basis as that pursued in the present case. The Michigan Supreme Court has recently issued an order which remanded the matter concerning that attorney to the Attorney Discipline Board for reconsideration in light of the present case. (Appendix B). Such an order certainly does not support Petitioner's argument that he has not received equal treatment.

The "equal protection" clause of the Fourteenth Amendment requires only equality of law, not equality of results. Massachusetts v Feeny, 442 U.S. 256, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979). As the Court stated in Struble v DAIIE, 86 Mich App 245, 272 NW2d 617 (1978):

> The purpose of the Equal Protection Clause of the Fourteenth Amendment is to secure every person within a state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by the express terms of a statute or by its improper execution by duly constituted agents. Fox v Employment Security Comm., 379 Mich 579, 588, 153 NW2d 644 (1967). Equal protection of the law requires that all persons subject to particular legislation be treated alike under like circumstances and conditions, but the guarantee of equal protection of the law is not one of equality of operation or application to all citizens of the state. Grayson v Board of Accountancy, 27 Mich App 26, 31-32; 183 NW2d 424 (1970). The Equal Protection Clause precludes irrational discrimination as between persons or groups of persons in the incidence of a law but does not require situations which are different in fact or opinion to be treated in law as though they were the same. Goesaert v Cleary, 335 US 464; 69 S Ct 198; 93 L Ed 163 (1948).

All disbarred attorneys seeking reinstatement must meet the same requirements of MCR 9.123(B). The holding which prohibits this Petitioner from reapplying until five years from the lapse of parole is based on the rationale that it takes a significant period of "unsupervised" conduct to show a person's true character and fitness to practice law. Petitioner is not the victim of intentional or arbitrary discrimination.

RELIEF

WHEREFORE, Respondent respectfully prays that the Petition For Writ Of Certiorari be denied.

Respectfully Submitted

/S/

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January 22, 1996

CHAPTER 9. PROFESSIONAL DISCIPLINARY PROCEEDINGS

Including Amendments Received Through February 1, 1995

SUBCHAPTER 9.100 ATTORNEY GRIEVANCE COMMISSION; ATTORNEY DISCIPLINE BOARD

RULE 9.101 DEFINITIONS

As used in subchapter 9.100:

(1) "board" means the Attorney Discipline Board;

(2) "commission" means the Attorney Grievance Commission;

(3) "administrator" means the grievance administrator;

(4) "investigator" means a person designated by the administrator to assist him or her in the investigation of alleged misconduct or requested reinstatement;

(5) "attorney" means a person regularly licensed or specially admitted to practice law in Michigan;

(6) "respondent" means an attorney named in a request for investigation or complaint;

(7) "request for investigation" means the first step in bringing alleged misconduct to the administrator's attention;

(8) "complaint" means the formal charge prepared by the administrator and filed with the board;

(9) "review" means examination by the board of a hearing panel's final order on petition by an aggrieved party;

(10) "appeal" means judicial re-examination by the Supreme Court of the board's final order on petition by an aggrieved party;

(11) "grievance" means alleged misconduct;

(12) "investigation" means fact-finding on alleged misconduct under the administrator's direction;

(13) "disbarment" means revocation of the license to practice law.

RULE 9.102 CONSTRUCTION; SEVERABILITY

(A) Construction. Subchapter 9.100 is to be liberally construed for the protection of the public, the courts, and the legal profession and applies to all pending matters of misconduct and reinstatement and to all future proceedings, even though the alleged misconduct occurred before the effective date of subchapter 9.100. Procedures must be as expeditious as possible.

(B) Severability. If a court finds a portion of subchapter 9.100 or its application to a person or circumstances invalid, the invalidity does not affect the remaining portions or other applications. To this end the rules are severable.

RULE 9.103 STANDARDS OF CONDUCT FOR ATTORNEYS

(A) General Principles. The license to practice law in Michigan is, among other things, a continuing proclamation by the Supreme Court that the holder is fit to be entrusted with professional and judicial matters and to aid in the

administration of justice as an attorney and counselor and as an officer of the court. It is the duty of every attorney to conduct himself or herself at all times in conformity with standards imposed on members of the bar as a condition of the privilege to practice law. These standards include, but are not limited to, the rules of professional responsibility and the rules of judicial conduct that are adopted by the Supreme Court.

(B) Duty to Assist Public to Request Investigation. An attorney shall assist a member of the public to communicate to the administrator, in appropriate form, a request for investigation of a member of the bar.

(C) Duty to Assist Administrator. An attorney shall assist the administrator in the investigation, prosecution, and disposition of a request for investigation or complaint filed with or by the administrator.

RULE 9.104 GROUNDS FOR DISCIPLINE IN GENERAL; ADJUDICATION ELSEWHERE

The following acts or omissions by an attorney, individually or in concert with another person, are misconduct and grounds for discipline, whether or not occurring in the course of an attorney-client relationship:

(1) conduct prejudicial to the proper administration of justice;

(2) conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach;

(3) conduct that is contrary to justice, ethics, honesty, or good morals;

(4) conduct that violates the standards or rules of

professional responsibility adopted by the Supreme Court;

(5) conduct that violates a criminal law of a state or of the United States;

(6) knowing misrepresentation of any facts or circumstances surrounding a request for investigation or complaint;

(7) failure to answer a request for investigation or complaint in conformity with MCR 9.113 and 9.115(D);

(8) contempt of the board or a hearing panel; or

(9) violation of an order of discipline.

Proof of an adjudication of misconduct in a disciplinary proceeding by another state or a United States court is conclusive proof of misconduct in a disciplinary proceeding in Michigan. The only issues to be addressed in the Michigan proceeding are whether the respondent was afforded due process of law in the course of the original proceedings and whether imposition of identical discipline in Michigan would be clearly inappropriate.

RULE 9.105 PURPOSE AND FUNDING OF DISCIPLINARY PROCEEDINGS

Discipline for misconduct is not intended as punishment for wrongdoing, but for the protection of the public, the courts, and the legal profession. The fact that certain misconduct has remained unchallenged when done by others or when done at other times or has not been earlier made the subject of disciplinary proceedings is not an excuse. The legal profession, through the State Bar of Michigan, is responsible for the reasonable and necessary expenses of the board, the commission, and the administrator, as determined by the Supreme Court. Commissioners of the State Bar of

Michigan and other attorneys who are associated with a commissioner in the practice of law may not represent respondents in proceedings before the board, including preliminary discussions with commission employees prior to the filing of a request for investigation.

RULE 9.106 TYPES OF DISCIPLINE; MINIMUM DISCIPLINE; ADMONISHMENT

Misconduct is grounds for:

(1) revocation of the license to practice law in Michigan;

(2) suspension of the license to practice law in Michigan for a specified term, not less than 30 days, with such additional conditions relevant to the established misconduct as a hearing panel, the board, or the Supreme Court may impose, and, if the term exceeds 179 days, until the further order of a hearing panel, the board, or the Supreme Court;

(3) reprimand with such conditions relevant to the established misconduct as a hearing panel, the board, or the Supreme Court may impose;

(4) probation ordered by a hearing panel, the board, or the Supreme Court under MCR 9.121(C);

(5) requiring restitution, in an amount set by a hearing panel, the board, or the Supreme Court, as a condition of an order of discipline; or

(6) with the respondent's consent, admonishment by the commission without filing a complaint. An admonition does not constitute discipline and shall be confidential under MCR 9.126 except as provided by MCR 9.115(J)(3). The administrator shall notify the respondent of the provisions of this rule and the respondent may, within 21 days of service

of the admonition, notify the commission in writing that respondent objects to the admonishment. Upon timely receipt of the written objection, the commission shall vacate the admonition and either dismiss the request for investigation or authorize the filing of a complaint.

RULE 9.107 RULES EXCLUSIVE ON DISCIPLINE

(A) Proceedings for Discipline. Subchapter 9.100 governs the procedure to discipline attorneys. A proceeding under subchapter 9.100 is subject to the superintending control of the Supreme Court. An investigation or proceeding may not be held invalid because of a nonprejudicial irregularity or an error not resulting in a miscarriage of justice.

(B) Local Bar Associations. A local bar association may not conduct a separate proceeding to discipline an attorney, but must assist and cooperate with the administrator in reporting and investigating alleged misconduct of an attorney.

RULE 9.108 ATTORNEY GRIEVANCE COMMISSION

(A) Authority of Commission. The Attorney Grievance Commission is the prosecution arm of the Supreme Court for discharge of its constitutional responsibility to supervise and discipline Michigan attorneys.

(B) Composition. The commission consists of 3 laypersons and 6 attorneys appointed by the Supreme Court. The members serve 3-year terms. A member may not serve more than 2 full terms.

(C) Chairperson and Vice-Chairperson. The Supreme Court shall designate from among the members of the commission a chairperson and a vice-chairperson who shall

serve 1-year terms in those offices. The commencement and termination dates for the 1-year terms shall coincide appropriately with the 3-year membership terms of those officers and the other commission members. The Supreme Court may reappoint these officers for additional terms and may remove these officers prior to the expiration of a term. An officer appointed to fill a mid-term vacancy shall serve the remainder of that term and may be reappointed to serve a full term.

(D) Internal Rules.

(1) The commission must elect annually from among its membership a secretary to keep the minutes of the commission's meetings and issue the required notices.

(2) Five members constitute a quorum. The commission acts by majority vote of the members present.

(3) The commission must meet monthly at a time and place the chairperson designates. Notice of a regular monthly meeting is not required.

(4) A special meeting may be called by the chairperson or by petition of 3 commission members on 7 days' written notice. The notice may be waived in writing or by attending the meeting.

(E) Powers and Duties. The commission has the power and duty to

(1) recommend attorneys to the Supreme Court for appointment as administrator and deputy administrator;

(2) supervise the investigation of attorney misconduct, including requests for investigation of and complaints against attorneys;

(3) supervise the administrator and his or her staff;

(4) seek an injunction from the Supreme Court against an attorney's misconduct when prompt action is required, even if a disciplinary proceeding concerning that conduct is not pending before the board;

(5) annually write a budget for the commission and the administrator's office (including compensation) and submit it to the Supreme Court for approval;

(6) submit to the Supreme Court proposed changes in these rules;

(7) annually submit to the Supreme Court a report summarizing the commission's activities during the past year; and

(8) perform other duties provided in these rules.

RULE 9.109 GRIEVANCE ADMINISTRATOR

(A) Appointment. The administrator and the deputy administrator must be attorneys. The commission shall recommend one or more candidates for appointment as administrator and deputy administrator. The Supreme Court shall appoint the administrator and the deputy administrator, may terminate their appointments at any time with or without cause, and shall determine their salaries and the other terms and conditions of their employment.

(B) Powers and Duties. The administrator has the power and duty to:

(1) employ or retain attorneys, investigators, and staff with the approval of the commission;

(2) supervise the attorneys, investigators, and staff;

(3) assist the public in preparing requests for investigation;

(4) maintain the commission records created as a result of these rules;

(5) investigate alleged misconduct of attorneys, including serving a request for investigation in his or her own name if necessary;

(6) prosecute complaints the commission authorizes;

(7) prosecute or defend reviews and appeals as the commission authorizes; and

(8) perform other duties provided in these rules or assigned by the commission.

(C) Legal Counsel for the Administrator.

(1) The administrator may appoint and retain volunteer legal counsel needed to prosecute proceedings under these rules.

(2) Legal counsel may

(a) prepare and file complaints and notices of hearings;

(b) present evidence relating to complaints or petitions for reinstatement;

(c) prepare and file arguments and briefs;

(d) inform the administrator about the progress of cases assigned; and

(e) perform other duties assigned by the administrator.

RULE 9.110 ATTORNEY DISCIPLINE BOARD

(A) Authority of Board. The Attorney Discipline Board is the adjudicative arm of the Supreme Court for discharge of its exclusive constitutional responsibility to supervise and discipline Michigan attorneys.

(B) Composition. The board consists of 6 attorneys and 3 laypersons appointed by the Supreme Court. The members serve 3-year terms. A member may not serve more than 2 full terms.

(C) Chairperson and Vice-Chairperson. The Supreme Court shall designate from among the members of the board a chairperson and a vice-chairperson who shall serve 1-year terms in those offices. The commencement and termination dates of the 1-year terms shall coincide appropriately with the 3-year board terms of those officers and the other board members. The Supreme Court may reappoint these officers for additional terms and may remove an officer prior to the expiration of a term. An officer appointed to fill a midterm vacancy shall serve the remainder of that term and may be reappointed to serve a full term.

(D) Internal Rules.

(1) The board must elect annually from among its membership a secretary to supervise the keeping of the minutes of the board's meetings and the issuance of the required notices.

(2) Five members constitute a quorum. The board acts by a majority vote of the members present.

(3) The board shall meet monthly as often as necessary to maintain a current docket, but no less than every 2 months, at a time and place the chairperson designates.

(4) A special meeting may be called by the chairperson or by petition of 3 board members on 7 days' written notice. The notice may be waived in writing or by attending the meeting.

(E) Powers and Duties. The board has the power and duty to

(1) appoint an attorney to serve as its general counsel and executive director;

(2) appoint hearing panels and masters;

(3) assign a complaint to a hearing panel or to a master;

(4) on request of the respondent, the administrator, or the complainant, review a final order of discipline or dismissal by a hearing panel;

(5) discipline and reinstate attorneys under these rules;

(6) file with the Supreme Court clerk its orders of suspension, disbarment, and reinstatement;

(7) annually write a budget for the board and submit it to the Supreme Court for approval;

(8) annually submit to the Supreme Court a report summarizing the board's activities during the past year; and

(9) submit to the Supreme Court proposed changes in these rules.

RULE 9.111 HEARING PANELS

(A) Composition; Quorum. The board must annually appoint 3 attorneys to each hearing panel and must fill a vacancy as it occurs. Following appointment, the board may designate the panel's chairperson, vice-chairperson and secretary. Thereafter, a hearing panel may elect a chairperson, vice-chairperson and secretary. A hearing panel must convene at the time and place designated by its chairperson or by the board. Two members constitute a quorum. A hearing panel acts by a majority vote. If a panel is unable to reach a majority decision, the matter shall be referred to the board for reassignment to a new panel.

(B) Powers and Duties. A hearing panel shall do the following:

(1) Hold a public hearing on a complaint or reinstatement petition assigned to it within 56 days after the date the complaint is filed with the board or the date that notice of the reinstatement petition is published. A hearing must be concluded within 91 days after it is begun, unless the board grants an extension for good cause.

(2) Receive evidence and make written findings of fact.

(3) Discipline and reinstate attorneys or dismiss a complaint by order, under these rules.

(4) Report its actions to the board within 28 days after the conclusion of a hearing.

(5) Perform other duties provided by these rules.

RULE 9.112 REQUESTS FOR INVESTIGATION

(A) Availability to Public. The administrator shall furnish

a form for a request for investigation to a person who alleges misconduct against an attorney. Forms must be available to the public through each state bar office and county clerk's office. Use of the form is not required for filing a request for investigation.

(B) Form of Request. A request for investigation of alleged misconduct must

(1) be in writing;

(2) describe the alleged misconduct, including the approximate time and place of it;

(3) be signed by the complainant; and

(4) be filed with the administrator.

(C) Handling by Administrator.

(1) *Request for Investigation of Attorney.* After making a preliminary investigation, the administrator shall either

(a) notify the complainant and the respondent that the allegations of the request for investigation are inadequate, incomplete, or insufficient to warrant the further attention of the commission; or

(b) serve a copy of the request for investigation on the respondent by ordinary mail at the respondent's address on file with the State Bar as required by Rule 2 of the Supreme Court Rules Concerning the State Bar of Michigan. Service is effective at the time of mailing, and nondelivery does not affect the validity of service. If a respondent has not filed an answer, no formal complaint shall be filed with the board unless the administrator has served the request for investigation by registered or certified mail return receipt requested.

(2) *Request for Investigation of Judge.* The administrator shall forward to the Judicial Tenure Commission a request for investigation of a judge, even if the request arises from the judge's conduct before he or she became a judge or from conduct unconnected with his or her judicial office. MCR 9.116 thereafter governs.

(3) *Request for Investigation of Member or Employee of Commission or Board.* Except as modified by MCR 9.131, MCR 9.104-9.130 apply to a request for investigation of an attorney who is a member of or is employed by the board or the commission.

(D) Subpoenas.

(1) After the request for investigation has been served on the respondent, the commission may issue subpoenas to require the appearance of a witness or the production of documents or other tangible things concerning matters then under investigation. Documents or other tangible things so produced may be subjected to nondestructive testing. Subpoenas shall be returnable before the administrator or a person designated by the administrator.

(2) A person who without just cause, after being commanded by a subpoena, fails or refuses to appear or give evidence, to be sworn or affirmed, or to answer a proper question after being ordered to do so is in contempt. The administrator may initiate a contempt proceeding under MCR 3.606 in the circuit court for the county where the act or refusal to act occurred.

(3) A subpoena issued pursuant to this subrule and certified by the commission chairperson shall be sufficient authorization for taking a deposition or seeking the production of evidence outside the State of Michigan. If the deponent or the person possessing the subpoenaed evidence will not comply voluntarily, the proponent of the subpoena

may utilize MCR 2.305(D) or any similar provision in a statute or court rule of Michigan or of the state, territory, or country where the deponent or possessor resides or is present.

RULE 9.113 ANSWER BY RESPONDENT

(A) Answer. Within 21 days after being served with a request for investigation under MCR 9.112(C)(1)(b), the respondent shall file with the administrator a signed, written answer in duplicate fully and fairly disclosing all the facts and circumstances pertaining to the alleged misconduct. The administrator may allow further time to answer. Misrepresentation in the answer is grounds for discipline. The administrator shall provide a copy of the answer and any supporting documents to the person who filed the request for investigation unless the administrator determines that there is cause for not disclosing some or all of the documents.

(B) Refusal or Failure to Answer.

(1) A respondent may refuse to answer a request for investigation on expressed constitutional or professional grounds.

(2) The failure of a respondent to answer within the time permitted is misconduct. See MCR 9.104(7).

(3) If a respondent refuses to answer under subrule (B)(1), the refusal may be submitted to a hearing panel for adjudication.

(C) Attorney-Client Privilege. A person who files a request for investigation of an attorney waives any attorney-client privilege that he or she may have as to matters relating to the request for the purposes of the commission's investigation.

RULE 9.114 ACTION BY ADMINISTRATOR OR COMMISSION AFTER ANSWER

(A) Action After Investigation. After an answer is filed or the time for filing expires, the administrator may assign the request and answer for further investigation or informal hearing. When investigation is complete, the administrator shall refer the request to the commission for its review. The commission may direct that a complaint be filed, that the request be dismissed, or that the respondent be admonished with his or her consent.

(B) Assistance of Law Enforcement Agencies. The administrator may request a law enforcement office to assist in an investigation by furnishing all available information about the respondent. Law enforcement officers are requested to comply promptly with each request.

(C) Report by Administrator. The administrator shall inform the complainant and, if the respondent answered, the respondent, of the final disposition of every request for investigation dismissed by the commission without a hearing before a hearing panel.

(D) Retention of Records. All files and records relating to allegations of misconduct by an attorney must be retained by the commission for the lifetime of the attorney, except as follows:

(1) The administrator may destroy the files or records relating to a request for investigation dismissed by the commission after 3 years have elapsed from the date of dismissal.

(2) If no request for investigation was pending when the files or records were created or acquired, and no related request for investigation was filed subsequently, the

administrator may destroy the files or records after 3 years have elapsed from the date when they were created or acquired by the commission.

RULE 9.115 HEARING PANEL PROCEDURE

(A) Rules Applicable. Except as otherwise provided in these rules, the rules governing practice and procedure in a nonjury civil action apply to a proceeding before a hearing panel. Pleadings must conform as nearly as practicable to the requirements of subchapter 2.100. The original of the formal complaint and all other pleadings must be filed with the board. The formal complaint must be served on the respondent. All other pleadings must be served on the opposing party and each member of the hearing panel. Proof of service of the formal complaint may be filed at any time prior to the date of the hearing. Proof of service of all other pleadings must be filed with the original pleadings.

(B) Complaint. Except as provided by MCR 9.120, a complaint setting forth the facts of the alleged misconduct begins proceedings before a hearing panel. The administrator shall prepare the complaint, file it with the board, and serve it on the respondent and, if the respondent is a member of or is associated with a law firm, on the firm. The unwillingness of a complainant to prosecute, or a settlement between the complainant and the respondent, does not itself affect the right of the administrator to proceed.

(C) Service. Service of the complaint and all subsequent pleadings and orders must be made by personal service or by registered or certified mail addressed to the person at the person's last known address. An attorney's last known address is the address on file with the state bar as required by Rule 2 of the Supreme Court Rules Concerning the State Bar of Michigan. A respondent's attorney of record must also be served, but service may be made under MCR 2.107.

Service is effective at the time of mailing, and nondelivery does not affect the validity of the service.

(D) Answer.

(1) Within 21 days after the complaint is served, the respondent shall file and serve a signed answer as provided in subrule (A).

(2) A default, with the same effect as a default in a civil action, may enter against a respondent who fails within the time permitted to file an answer admitting, denying, or explaining the complaint, or asserting the grounds for failing to do so.

(E) Representation by Attorney. The respondent may be represented by an attorney, who must enter an appearance.

(F) Prehearing Procedure.

(1) *Extensions.* If good cause is shown, the hearing panel chairperson may grant one extension of time per party for filing pleadings and may grant one adjournment per party. Additional requests may be granted by the board chairperson if good cause is shown. Pending criminal or civil litigation of substantial similarity to the allegations of the complaint is not necessarily grounds for an adjournment.

(2) *Motion to Disqualify.*

(a) Within 14 days after an answer has been filed or the time for filing the answer has expired, each member of the hearing panel shall disclose in a writing filed with the board any information that the member believes could be grounds for disqualification under the guidelines of MCR 2.003(B). The duty to disclose shall be a continuing one. The board shall serve a copy of the disclosure on each party.

(b) Within 14 days after the board serves a copy of a written disclosure, the respondent or the administrator may move to disqualify a member of the hearing panel. The board chairperson shall decide the motion under the guidelines of MCR 2.003.

(c) The board must assign a substitute for a disqualified member of a hearing panel. If all are disqualified, the board must reassign the complaint to another panel.

(3) *Amendment of Pleadings.* The administrator and the respondent each may amend a pleading once as a matter of course within 14 days after being served with a responsive pleading by the opposing party, or within 15 days after serving the pleading if it does not require a responsive pleading. Otherwise, a party may amend a pleading only by leave granted by the hearing panel chairperson or with the written consent of the adverse party.

(4) *Discovery.* Pretrial or discovery proceedings are not permitted, except as follows:

(a) Within 21 days of the service of a formal complaint, a party may demand in writing that documentary evidence that is to be introduced at the hearing by the opposing party be made available for inspection and copying. Within 14 days after service of a written demand, the documents shall be made available, provided that the administrator need not comply prior to the filing of the respondent's answer; in such case, the administrator shall comply with the written demand within 14 days of the filing of the respondent's answer. The respondent shall comply with the written demand within 14 days, except that the respondent need not comply until the time for filing an answer to the formal complaint has expired.

Any other documentary evidence to be introduced at the hearing by either party shall be supplied to the other party no later than 14 days prior to the hearing. Any documentary evidence not so supplied shall be excluded from the hearing except for good cause shown.

(b) Within 21 days of the service of a formal complaint, a party may demand in writing that the opposing party supply written notification of the name and address of any person to be called as a witness. Within 14 days after the service of a written demand, the notification shall be supplied. However, the administrator need not comply prior to the filing of the respondent's answer to the formal complaint; in such cases, the administrator shall comply with the written demand within 14 days of the filing of the respondent's answer to the formal complaint. The respondent shall comply with the written demand within 14 days, except that the respondent need not comply until the time for filing an answer to the formal complaint has expired. Except for good cause shown, a party who is required to give said notification must give supplemental notice to the adverse party within 7 days after any additional witness has been identified, and must give the supplemental notice immediately if the additional witness is identified less than 14 days before a scheduled hearing.

(c) A deposition may be taken of a witness who lives outside the state or is physically unable to attend the hearing. For good cause shown, the hearing panel may allow the parties to depose other witnesses.

(d) The hearing panel may order a prehearing conference held before a panel member to obtain

admissions or otherwise narrow the issues presented by the pleadings.

If a party fails to comply with subrule (F)(4)(a) or (b), the hearing panel or the board may, on motion and showing of material prejudice as a result of the failure, impose one or more of the sanctions set forth in MCR 2.313(B)(2)(a)-(c).

(5) *Discipline by Consent.* A respondent may offer to plead nolo contendere or to admit all essential facts contained in the complaint or any of its allegations in exchange for a stated form of discipline and on the condition that the plea or admission and discipline agreed on is accepted by the commission and the hearing panel. The respondent's offer shall first be submitted to the commission. If the offer is accepted by the commission, the administrator and the respondent shall prepare a stipulation for a consent order of discipline and file the stipulation with the hearing panel. At the time of the filing, the administrator shall serve a copy of the proposed stipulation upon the complainant. If the hearing panel approves the stipulation, it shall enter a final order of discipline. If not approved, the offer is deemed withdrawn and statements or stipulations made in connection with the offer are inadmissible in disciplinary proceedings against the respondent and not binding on the respondent or the administrator. If the stipulation is not approved, the matter must then be referred for hearing to a hearing panel other than the one that passed on the proposed discipline.

(G) Hearing Time and Place; Notice. The board or the chairperson of the hearing panel shall set the time and place for a hearing. Notice of a hearing must be served by the board or the chairperson of the hearing panel on the administrator, the respondent, the complainant, and any attorney of record at least 21 days before the initial hearing. Unless the board or the chairperson of the hearing panel otherwise directs, the hearing must be in the county in which

the respondent has or last had an office or residence. If the hearing panel fails to convene or complete its hearing within a reasonable time, the board may reassign the complaint to another panel or to a master. A party may file a motion for a change of venue. The motion must be filed with the board, and shall be decided by the board chairperson, in part, on the basis of the guidelines in MCR 2.221.

(H) Respondent's Appearance. The respondent shall personally appear at the hearing and is subject to cross-examination as an opposite party under MCL 600.2161; MSA 27A.2161. If the respondent, or the respondent's attorney on his or her behalf, claims physical or mental incapacity as a reason for the respondent's failure to appear before a hearing panel or the board, the panel or the board on its own initiative may suspend the respondent from the practice of law until further order of the panel or board. The order of suspension must be filed and served as other orders of discipline.

(I) Hearing; Contempt.

(1) A hearing panel may issue subpoenas (including subpoenas for production of documents and other tangible things), cause testimony to be taken under oath, and rule on the admissibility of evidence under the Michigan Rules of Evidence. The oath or affirmation may be administered by a panel member. A subpoena must be issued in the name and under the seal of the board. It must be signed by a panel or board member, by the administrator, or by the respondent or the respondent's attorney. A subpoenaed witness must be paid the same fee and mileage as a witness subpoenaed to testify in the circuit court. Parties must notify their own witnesses of the date, time, and place of the hearing.

(2) A person who without just cause fails or refuses to appear and give evidence as commanded by a subpoena, to

be sworn or affirmed, or to answer a proper question after he or she has been ordered to do so, is in contempt. The administrator may initiate a contempt proceeding under MCR 3.606 in the circuit court for the county where the act or refusal to act occurred.

(J) Decision.

(1) The hearing panel must file a report on its decisions regarding the misconduct charges and, if applicable, the resulting discipline. The report must include a certified transcript, a summary of the evidence, pleadings, exhibits and briefs, and findings of fact. The discipline section of the report must also include a summary of all previous misconduct for which the respondent was disciplined or admonished.

(2) Upon a finding of misconduct, the hearing panel shall conduct a separate hearing to determine the appropriate discipline. The hearing on discipline shall be conducted as soon after the finding of misconduct as is practicable and may be held immediately following the panel's ruling that misconduct has been established.

(3) If the hearing panel finds that the charge of misconduct is established by a preponderance of the evidence, it must enter an order of discipline. The order shall take effect 21 days after it is served on the respondent unless the panel finds good cause for the order to take effect on a different date, in which event the panel's decision must explain the reasons for ordering a different effective date. In determining the discipline to be imposed, any and all relevant evidence of aggravation or mitigation shall be admissible, including previous admonitions and orders of discipline.

(4) If the hearing panel finds that the charge of misconduct is not established by a preponderance of the evidence, it

must enter an order dismissing the complaint.

(5) The report and order must be signed by the panel chairperson and filed with the board and the administrator. A copy must be served on the parties as required by these rules.

(K) Stay of Discipline. If a discipline order is a suspension of 179 days or less, a stay of the discipline order will automatically issue on the timely filing by the respondent of a petition for review and a petition for a stay of the discipline. If the discipline ordered is more severe than a suspension of 179 days, the respondent may petition the board for a stay pending review of the discipline order. Once granted, a stay remains effective until the further order of the board.

(L) Enforcement. The administrator shall take the necessary steps to enforce a discipline order after it is effective.

(M) Resignation by Respondent; Admission of Charges. An attorney's request that his or her name be stricken from the official register of attorneys may not be accepted while a request for investigation or a complaint is pending, except pursuant to an order of revocation.

RULE 9.116 HEARING PROCEDURE; JUDGES OTHER THAN MAGISTRATES AND REFEREES

(A) Application of This Rule. This rule governs an action by the commission against a judge, except that it does not apply to an action against a magistrate or referee for misconduct separately arising from the practice of law, whether before or during the period when the person serves as a magistrate or referee.

(B) Time. The commission may not take action against a judge unless and until the Judicial Tenure Commission recommends a sanction. Then, notwithstanding the pendency of certification to and review by the Supreme Court of the Judicial Tenure Commission's action, the commission may, without an investigation, direct the administrator to file a complaint with the board.

(C) Complaint; Time and Place of Hearing; Answer. The administrator shall file a complaint setting forth the facts of the alleged misconduct within 14 days after the Judicial Tenure Commission files its order with the Supreme Court. The chairperson of the hearing panel assigned by the board shall designate a place and a time for the hearing no later than 21 days after the complaint is filed. The complaint and notice of the hearing must be served within 7 days after the complaint is filed. Within 14 days after the complaint and notice of the hearing are served, the respondent judge shall file an answer.

(D) Rules Applicable; Judicial Tenure Commission Record. To the extent it is consistent with this rule, MCR 9.115 governs hearing procedure against a respondent judge. The record of the Judicial Tenure Commission proceeding is admissible at the hearing. The administrator or the respondent may introduce additional evidence.

(E) Decision. Within 28 days after the hearing is concluded, the panel must file with the Supreme Court clerk and the board a report and order conforming with MCR 9.115(J) and serve them on the administrator and the respondent.

(1) If the Judicial Tenure Commission has recommended suspension, the panel may not disbar the respondent and may not suspend the respondent from practicing law for a period beginning earlier than or extending beyond the suspension period recommended by the Judicial Tenure Commission.

(2) If the Judicial Tenure Commission has not recommended either suspension or removal from office, and the respondent continues to hold a judicial office, then the panel may not disbar or suspend the respondent.

(3) If the Judicial Tenure Commission has recommended removal from office, or if the respondent no longer holds a judicial office, then the panel may impose any type of discipline authorized by these rules.

(F) Appeal. The respondent-judge may file a petition for review under MCR 9.118.

RULE 9.117 HEARING PROCEDURE BEFORE MASTER

If the board assigns a complaint to a master, the master shall hold a public hearing on the complaint and receive evidence. To the extent that MCR 9.115 may be applied, it governs procedure before a master. After the hearing, the master shall prepare a report containing

(1) a brief statement of the proceedings,

(2) findings of fact, and

(3) conclusions of law.

The master shall file the report with a hearing panel designated by the board and serve a copy on the administrator and the respondent. Within 14 days after the report is filed, the administrator or the respondent may file objections to the report and a supporting brief. The panel must determine if the record supports the findings of fact and conclusions of law and impose discipline, if warranted. Further proceedings are governed by MCR 9.118.

RULE 9.118 REVIEW OF ORDER OF HEARING PANEL

(A) Review of Order; Time.

(1) The administrator, the complainant, or the respondent may petition the board in writing to review the order of a hearing panel filed under MCR 9.115, 9.116, 9.121 or 9.124. A petition for review must set forth the reasons and the grounds on which review is sought and must be filed with the board within 21 days after the order is served. The petitioner must serve copies of the petition and the accompanying documents on the other party and the complainant and file a proof of service with the board.

(2) A cross-petition for review may be filed within 21 days after the petition for review is served on the cross-petitioner. The cross-petition must be served on the other party and the complainant, and a proof of service must be filed with the board.

(3) A delayed petition for review may be considered by the board chairperson under the guidelines of MCR 7.205(F).

(B) Order to Show Cause. If a petition for review is timely filed or a delayed petition for review is accepted for filing, the board shall issue an order to show cause, at a date and time specified, why the order of the hearing panel should not be affirmed. The order shall establish a briefing schedule for all parties and may require that an answer to the petition or cross-petition be filed. An opposing party may file an answer even if the order does not require one. The board must serve the order to show cause on the administrator, respondent, and complainant at least 21 days before the hearing. Failure to comply with the order to show cause, including, but not limited to, a requirement for briefs, may be grounds for dismissal of a petition for review.

Dismissal of a petition for review shall not affect the validity of a cross-petition for review.

(C) Hearing.

(1) A hearing on the order to show cause must be heard by a subboard or at least 3 board members assigned by the chairperson. The board must make a final decision on consideration of the whole record, including a transcript of the presentation made to the subboard and the subboard's recommendation. The respondent shall appear personally at the review hearing unless excused by the board. Failure to appear may result in denial of any relief sought by the respondent, or any other action allowable under MCR 9.118(D).

(2) If the board believes that additional testimony should be taken, it may refer the case to a hearing panel or a master. The panel or the master shall then take the additional testimony and make a supplemental report, including a transcript of the additional testimony, pleadings, exhibits, and briefs with the board. Notice of the filing of the supplemental report and a copy of the report must be served as an original report and order of a hearing panel.

(D) Decision. After the hearing on the order to show cause, the board may affirm, amend, reverse, or nullify the order of the hearing panel in whole or in part or order other discipline. A discipline order is not effective until 21 days after it is served on the respondent unless the board finds good cause for the order to take effect earlier.

(E) Motion for Reconsideration; Stay. A motion for reconsideration may be filed at any time before the board's order takes effect. An answer to a motion for reconsideration may be filed. The board may grant a stay pending its decision on a motion for reconsideration. If the board grants a stay, the stay remains effective for 21 days

after the board enters its order granting or denying reconsideration. In the absence of an order by the board, the filing of a motion for reconsideration does not stay an order of discipline.

(F) Filing Orders. The board must file a copy of its discipline order with the Supreme Court clerk and the clerk of the county where the respondent resides and where his or her office is located. The order must be served on all parties. If the respondent requests it in writing, a dismissal order must be similarly filed and served.

RULE 9.119 CONDUCT OF DISBARRED, SUSPENDED, OR INACTIVE ATTORNEYS

(A) Notification to Clients. An attorney whose license is revoked or suspended, or who is transferred to inactive status pursuant to MCR 9.121, or who is suspended for nondisciplinary reasons pursuant to Rule 4 of the Supreme Court Rules Concerning the State Bar of Michigan, shall, within 7 days of the effective date of the order of discipline, the transfer to inactive status or the nondisciplinary suspension, notify all of his or her active clients, in writing, by registered or certified mail, return receipt requested, of the following:

(1) the nature and duration of the discipline imposed, the transfer to inactive status, or the nondisciplinary suspension;

(2) the effective date of such discipline, transfer to inactive status, or nondisciplinary suspension;

(3) the attorney's inability to act as an attorney after the effective date of such discipline, transfer to inactive status, or nondisciplinary suspension;

(4) the location and identity of the custodian of the

clients' files and records, which will be made available to them or to substitute counsel;

(5) that the clients may wish to seek legal advice and counsel elsewhere; provided that, if the disbarred, suspended or inactive attorney was a member of a law firm, the firm may continue to represent each client with the client's express written consent;

(6) the address to which all correspondence to the attorney may be addressed.

(B) Conduct in Litigated Matters. In addition to the requirements of subsection (A) of this rule, the affected attorney must, by the effective date of the order of revocation, suspension, or transfer to inactive status, in every matter in which the attorney is representing a client in litigation, file with the tribunal and all parties a notice of the attorney's disqualification from the practice of law.

(C) Filing of Proof of Compliance. Within 14 days after the effective date of the order of revocation, suspension, or transfer to inactive status pursuant to MCR 9.121, the disbarred, suspended, or inactive attorney shall file with the administrator and the board an affidavit showing full compliance with this rule. The affidavit must include as an appendix copies of the disclosure notices and mailing receipts required under subrules (A) and (B) of this rule. A disbarred, suspended, or inactive attorney shall keep and maintain records of the various steps taken under this rule so that, in any subsequent proceeding instituted by or against him or her, proof of compliance with this rule and with the disbarment or suspension order will be available.

(D) Conduct After Entry of Order Prior to Effective Date. A disbarred or suspended attorney, after entry of the order of revocation or suspension and prior to its effective date, shall not accept any new retainer or engagement as

attorney for another in any new case or legal mater of any nature, unless specifically authorized by the board chairperson upon a showing of good cause and a finding that it is not contrary to the interests of the public and profession. However, during the period between the entry of the order and its effective date, the suspended or disbarred attorney may complete, on behalf of any existing client, all matters that were pending on the entry date.

(E) Conduct After Effective Date of Order. An attorney who is disbarred or suspended, or who is transferred to inactive status pursuant to MCR 9.121 is, during the period of disbarment, suspension, or inactivity forbidden from:

(1) practicing law in any form;

(2) appearing as an attorney before any court, judge, justice, board, commission, or other public authority; and

(3) holding himself or herself out as an attorney by any means.

(F) Compensation of Disbarred, Suspended, or Inactive Attorney. An attorney whose license is revoked or suspended, or who is transferred to inactive status pursuant to MCR 9.121 may not share in any legal fees for legal services performed by another attorney during the period of disqualification from the practice of law. A disbarred, suspended, or inactive attorney may be compensated on a quantum meruit basis for legal services rendered and expenses paid by him or her prior to the effective date of the revocation, suspension, or transfer to inactive status.

(G) Inventory. If the attorney whose license is revoked or suspended, or who is transferred to inactive status pursuant to MCR 9.121 was a member of a firm, the firm may continue to represent each client with the client's express written consent. If an attorney is transferred to inactive

status or is disbarred or suspended and fails to give notice under the rule, or disappears or dies, and there is no partner, executor or other responsible person capable of conducting the attorney's affairs, the administrator may ask the chief judge in the judicial circuit in which the attorney maintained his or her practice to appointing a person to inventory the attorney's files and to take any action necessary to protect the interests of the attorney and the attorney's clients. The person appointed may not disclose any information contained in any inventoried file without the client's written consent. The person appointed is analogous to a receiver operating under the direction of the circuit court.

RULE 9.120 CONVICTION OF CRIMINAL OFFENSE

(A) Notification of the Grievance Administrator and the Attorney Discipline Board. When a lawyer is convicted of a crime, the lawyer, the prosecutor or other authority who prosecuted the lawyer, and the defense attorney who represented the lawyer must notify the grievance administrator and the board of the conviction. This notice must be given in writing within 14 days after the conviction.

(B) Suspension.

(1) On conviction of a felony, an attorney is automatically suspended until the effective date of an order filed by a hearing panel under MCR 9.115(J). A conviction occurs upon the return of a verdict of guilty or upon the acceptance of a plea of guilty or nolo contendere. The board may, on the attorney's motion, set aside the automatic suspension when it appears consistent with the maintenance of the integrity and honor of the profession, the protection of the public, and the interests of justice. The board must set aside the automatic suspension if the felony conviction is vacated, reversed, or otherwise set aside for any reason by the trial court or an appellate court.

(2) In a disciplinary proceeding instituted against an attorney based on the attorney's conviction of a criminal offense, a certified copy of the judgment of conviction is conclusive proof of the commission of the criminal offense.

(3) The administrator may file with the board a judgment of conviction showing that an attorney has violated a criminal law of a state or of the United States. The board shall then order the attorney to show cause why a final order of discipline should not be entered, and the board shall refer the proceeding to a hearing panel for hearing. At the hearing, questions as to the validity of the conviction, alleged trial errors, and the availability of appellate remedies shall not be considered. After the hearing, the panel shall issue an order under MCR 9.115(J).

(C) Pardon; Conviction Reversed. On a pardon the board may, and on a reversal the board must, by order filed and served under MCR 9.118(E), vacate the suspension. The attorney's name must be returned to the roster of Michigan attorneys and counselors at law, but the administrator may nevertheless proceed against the respondent for misconduct which had led to the criminal charge.

RULE 9.121 ATTORNEY DECLARED TO BE INCOMPETENT OR ALLEGED TO BE INCAPACITATED OR ASSERTING IMPAIRED ABILITY

(A) Adjudication by Court. If an attorney has been judicially declared incompetent or involuntarily committed on the grounds of incompetency or disability, the board, on proper proof of the fact, must enter an order effective immediately transferring the attorney to inactive status for an indefinite period and until further order of the board.

(B) Allegations of Incompetency or Incapacity.

(1) If it is alleged in a complaint by the administrator that an attorney is incapacitated to continue the practice of law because of mental or physical infirmity or disability or because of addiction to drugs or intoxicants, a hearing panel shall take action necessary to determine whether the attorney is incapacitated, including an examination of the attorney by qualified medical experts the board designates.

(2) The hearing panel shall provide notice to the attorney of the proceedings and appoint an attorney to represent him or her if he or she is without representation.

(3) If, after a hearing, the hearing panel concludes that the attorney is incapacitated from continuing to practice law, it shall enter an order transferring him or her to inactive status for an indefinite period and until further order of the board.

(4) Pending disciplinary proceedings against the attorney must be held in abeyance.

(5) Proceedings conducted under this subrule are subject to review by the board as provided in MCR 9.118.

(C) Assertion of Impaired Ability; Probation.

(1) If, in response to a formal complaint filed under subrule 9.115(B), the respondent asserts in mitigation and thereafter demonstrates by a preponderance of the evidence that

> (a) during the period when the conduct which is the subject of the complaint occurred, his or her ability to practice law competently was materially impaired by physical or mental disability or by drug or alcohol addiction,
>
> (b) the impairment was the cause of or substantially

contributed to that conduct,

(c) the cause of the impairment is susceptible to treatment, and

(d) he or she in good faith intends to undergo treatment, and submits a detailed plan for such treatment,

the hearing panel, the board, or the Supreme Court may enter an order placing the respondent on probation for a specific period not to exceed 2 years if it specifically finds that an order of probation is not contrary to the public interest.

(2) If the respondent alleges impairment by physical or mental disability or by drug or alcohol addiction pursuant to subrule (C)(1), the hearing panel may order the respondent to submit to a physical or mental examination by a physical selected by the hearing panel or the board, which physical shall report to the hearing panel or board. The parties may obtain a psychiatric or medical evaluation at their own expense by examiners of their own choosing. No physician-patient privilege shall apply under this rule. The respondent's attorney may be present at an examination. A respondent who fails or refuses to comply with an examination order, or refuses to undergo an examination requested by the administrator, shall not be eligible for probation.

(3) The probation order may

(a) specify the treatment the respondent is to undergo,

(b) required the respondent to practice law only under the direct supervision of other attorneys, or

(c) include any other terms the evidence shows are likely to eliminate the impairment without subjected the respondent's clients or the public to a substantial risk of harm because the respondent is permitted to continue to practice law during the probation period.

(4) The probation order expires on the date specified in it unless the administrator petitions for, and the hearing panel, board, or court grants, an extension. An extension may not exceed 2 years. A probation order may be dissolved if the respondent demonstrates that the impairment giving rise to the probation order has been removed and that the probation order has been fully complied with, but only one motion to accelerate dissolution of a probation order may be filed during the probation period.

(5) On proof that a respondent has violated a probation order, he or she may be suspended or disbarred.

(D) Publication of Change in Status. The board must publish in the Michigan Bar Journal a notice of transfer to inactive status. A copy of the notice and the order must be filed and served under MCR 9.118.

(E) Reinstatement. An attorney transferred to inactive status under this rule may not resume active status until reinstated by the board's order and, if inactive 3 years or more, recertified by the Board of Law Examiners. The attorney may petition for reinstatement to active status once a year or at shorter intervals as the board may direct. A petition for reinstatement must be granted by the board on a showing by clear and convincing evidence that the attorney's disability has been removed and that he or she is fit to resume the practice of law. The board may take the action necessary to determine whether the attorney's disability has been removed, including an examination of the attorney by

qualified medical experts that the board designates. The board may direct at the expense of the examination be paid by the attorney. If an attorney was transferred to inactive status under subrule 9.121(A) and subsequently has been judicially declared to be competent, the board may dispense with further evidence that the disability has been removed and may order reinstatements to active status on terms it finds proper and advisable, including recertification.

(F) Waiver of Privilege. By filing a petition for reinstatement to active status under this rule, the attorney waives the doctor-patient privilege with respect to treatment during the period of his or her disability. The attorney shall disclose the name of every psychiatrist, psychologist, physician, and hospital or other institution by whom or in which the attorney has been examined or treated since the transfer to inactive status. The attorney shall furnish to the board written constant for each to divulge whatever information and record are requested by the board's medical experts.

RULE 9.122 REVIEW BY SUPREME COURT

(A) Kinds Available; Time for Filing.

(1) A party aggrieved, including the person who made a request for investigation, by a final order of discipline or dismissal entered by the board on review under MCR 9.118, may apply for leave to appeal to the Supreme Court under MCR 7.302 within 21 days after the order is entered. If a motion for reconsideration is filed before the board's order takes effect, the application for leave to appeal to the Supreme Court may be filed within 21 days after the board enters its order granting or denying reconsideration.

(2) If a request for investigation has been dismissed under MCR 9.112(C)(1) or 9.114(A), a party aggrieved by

the dismissal may file a complaint for mandamus in the Supreme Court under MCR 7.304.

(B) Rules Applicable. Except as modified by this rule, subchapter 7.300 governs an appeal.

(C) Stay of Order. If the discipline order is a suspension of 179 days or less, a stay of the order will automatically issue on the timely filing of an appeal by the respondent. The stay remains effective until conclusion of the appeal or further order of the Supreme Court. The respondent may petition the Supreme Court for a stay pending appeal of other orders of the board.

(D) Record on Appeal. The original papers constitute the record on appeal. The board shall certify the original record and file it with the Supreme Court promptly after the briefs of the parties have been filed. The record must include a list of docket entries, a transcript of testimony taken, and all pleadings, exhibits, briefs, findings of fact, and orders in the proceeding. If the record contains material protected, the protection continues unless otherwise ordered by the Supreme Court.

(E) Disposition. The Supreme Court may make any order it deems appropriate, including dismissing the appeal. The parties may stipulate to dismiss the appeal with prejudice.

RULE 9.123 ELIGIBILITY FOR REINSTATEMENT

(A) Suspension, 179 Days or Less. An attorney whose license has been suspended for 179 days or less is automatically reinstated by filing with the Supreme Court clerk, the board, and the administrator an affidavit showing that the attorney has fully complied with the terms and conditions of the suspension order. A false statement contained in the affidavit is ground for disbarment.

(B) Revocation or Suspension More Than 179 Days. An attorney whose license to practice law has been revoked or suspended for more that 179 days is not eligible for reinstatement until the attorney has petitioned for reinstatement under MCR 9.124 and has established by clear and convincing evidence that:

(1) he or she desires in good faith to be restored to the privilege of practicing law in Michigan;

(2) the terms of the suspension ordered has elapsed or 5 years have elapsed since revocation of the license;

(3) he or she has not practiced or attempted to practice law contrary to the requirement of his or her suspension or revocation;

(4) he or she has compiled fully with the order of discipline;

(5) his or her conduct since the order of discipline has been exemplary and above reproach;

(6) he or she has a proper understanding of and attitude toward the standards that are imposed on members of the bar and will conduct himself of herself in conformity with those standards;

(7) taking into account the nature of the misconduct which led to the revocation or suspension, he or she nevertheless can safely be recommended to the public, the courts, and the legal profession as a person fit to be consulted by others and to represent them and otherwise act in matters of trust and confidence, and in general to aid in the administration of justice as a member of the bar and as an officer of the court;

(8) he or she is in compliance with the requirements of subrule (C), if applicable; and

(9) he or she has reimbursed the client security fund of the State Bar or Michigan or has agreed to an arrangement satisfactory to the fund to reimburse the fund for any money paid from the fund as a result of his or her conduct. Failure to fully reimburse as agreed is ground for revocation of a reinstatement.

(C) Reinstatement After Three Years. An attorney who, as a result of disciplinary proceedings, resigns, is disbarred, or is suspended for any period of time, and who does not practice law for 3 years or more, whether as the result of the period of discipline or voluntarily, must be recertified by the Board of Law Examiners before the attorney maybe reinstated to the practice of law.

(D) Petition for Reinstatement; Filing Limitations.

(1) An attorney whose license to practice law has been suspended may not file a petition for reinstatement earlier than 56 days before the term of suspension ordered has fully elapsed.

(2) An attorney whose license to practice law has been revoked may not file a petition for reinstatement until 5 years have elapsed since revocation of the license.

(3) An attorney whose license to practice law has been revoked or suspended and who has been denied reinstatement may not file a new petition for reinstatement until at least 180 days from the effective date of the most recent hearing panel order granting or denying reinstatement.

RULE 9.124 PROCEDURE FOR REINSTATEMENT

(A) Filing of Petition. An attorney petitioning for reinstatement shall file the original petition for reinstatement with the Supreme Court clerk and a copy with the board and

the commission. If the petition and the affidavit required by subrule (B)(1) are facially sufficient, and the petitioner has paid the publication fee required by subrule (B)(2), the board shall assign the petition to a hearing panel. Otherwise, the board may dismiss the petition without prejudice.

(B) Petitioner's Responsibilities.

(1) The petitioner must file, contemporaneously with and as a part of the petition for reinstatements, a personal history affidavit containing the following information:

> (a) every residence address since the date of disqualification from the practice of law;
>
> (b) employment history since the time of disqualification, including the nature of employment, the name and address of every employer, the duration of such employment, and the name of the petitioner's immediate supervisor at each place of employment;
>
> (c) a copy of a current driver's license;
>
> (d) any continuing legal education in which the petitioner participated during the period of disqualification from the practice of law;
>
> (e) bank account statements, from the date of disqualification until the filing of the petition for reinstatements, for each and every bank account in which petitioner is named in any capacity;
>
> (f) any and all professional or occupational licenses obtained or maintained during the period of disqualification and whether any were suspended or revoked;

(g) any and all names used by petitioner since the time of disqualification;

(h) petitioner's place and date of birth;

(i) petitioner's social security number;

(j) whether, since the time of disqualification, petitioner was a party or a witness in any civil case, and the title, docket number, and court in which such case occurred;

(k) whether there are any outstanding judgments against the petitioner;

(l) whether petitioner was a defendant or a witness in any criminal case, and the title, docket number, and court in which such case occurred.

(2) The petitioner must, contemporaneously with the filing of the petition for reinstatement and personally history affidavit, remit to the administrator the fee for publication of a reinstatement notice in the Michigan Bar Journal.

(3) A petitioner who files the petition before the term of suspension ordered has fully elapsed must file an updated petition and personal history affidavit within 14 days after the term of suspension ordered has fully elapsed. All petitioners must file updated petitions and personal history affidavits with the hearing panel when the reinstatement hearing convenes. The supplemental findings must indicate any pertinent information that has changed since the previous filing.

(4) The petitioner must cooperate fully in the investigation

by the administrator into the petitioner's eligibility for reinstatement by promptly providing any information requested. If requested, the petitioner must participate in a recorded interview and answer fully and fairly under oath all questions about eligibility for reinstatement.

(C) Administrator's Responsibilities. Within 14 days after the commission received its copy of the petition for reinstatement, the administrator shall submit to the Michigan Bar Journal for publication a notice briefly describing the nature and date of the discipline, the misconduct for which the petitioner was disciplined, and the matters required to be proved for reinstatement. The administrator shall investigate the petitioner's eligibility for reinstatement before a hearing on it, report the findings in writing to the board and the hearing panel within 56 days of the date the board assigns the petition to the hearing panel, and serve a copy on the petitioner. For good cause, the hearing panel may allow the administrator to file the report at a later date, but in no event later than 7 days before the hearing. The report must summarize the facts of all previous misconduct and the available evidence bearing on the petitioner's eligibility for reinstatement. The report is not a pleading and does not serve to restrict the administrator in the presentation of evidence at the hearing. Any evidence omitted from the report or received by the administrator subsequent to the filing of the report must be disclosed promptly to the hearing panel and the petitioner.

(D) Hearing on Petition. A reinstatement hearing may not be held earlier than 28 days after the administrator files the investigative report with the hearing panel unless the hearing panel has extended the deadline for filing the report. The proceeding on a petition for reinstatement must conform as nearly as practicable to a hearing on a complaint. The petitioner shall appear personally before the hearing panel for cross-examination by the administrator and the hearing panel and answer fully and fairly under oath all questions

regarding eligibility for reinstatement. The administrator and the petitioner may call witnesses or introduce evidence bearing upon the petitioner's eligibility for reinstatement. The hearing panel must enter an order granting or denying reinstatement and make a written report signed by the chairperson, including a transcript of the testimony taken, pleadings, exhibits and briefs, and its findings of fact. A reinstatement order may grant reinstatement subject to conditions that are relevant to the established misconduct or otherwise necessary to insure the integrity of the profession, to protect the public, and to serve the interests of justice. The report and order must be filed and served under MCR 9.118(F).

(E) Review. Review is available under the rules governing review of other hearing panel orders.

RULE 9.125 IMMUNITY

A person is absolutely immune from suit for statements and communications transmitted solely to the administrator, the commission, or the commission staff, or given in an investigation or proceeding on alleged misconduct or reinstatement. The administrator, legal counsel, investigators, members of hearing panels, the commission, the board, and their staffs are absolutely immune from suit for conduct arising out of the performance of their duties.

RULES 9.126 OPEN HEARINGS; CONFIDENTIAL FILES AND RECORDS

(A) Investigations. Except as provided in these rules, investigations by the administrator or the staff may not be made public. At the respondent's option, final disposition of a request for investigation not resulting in formal charges may be made public. In addition, any interested person may inspect the request for investigation and the respondent's

answer thereto if a formal complaint has been filed.

(B) Hearings. Hearings before a hearing panel and the board must be open to the public, but not their deliberations.

(C) Papers. Formal pleadings, reports, findings, recommendations, discipline, reprimands, transcripts, and orders resulting from hearings must be open to the public. This subrule does not apply to a request for a disclosure authorization submitted to the board or the Supreme Court pursuant to subrules (D)(7) or (E)(5).

(D) Other Records. Other files and records of the board, the commission, the administrator, legal counsel, hearing panels and their members, and the staff of each may not be examined by or disclosed to anyone except

(1) the commission,

(2) the administrator,

(3) the respondent as provided under MCR 9.115(F)(4),

(4) members of hearing panels or the board,

(5) authorized employees,

(6) the Supreme Court, or

(7) other persons who are expressly authorized by the board or the Supreme Court.

If a disclosure is made to the Supreme Court, the board, or a hearing panel, the information must also be disclosed to the respondent.

(E) Other Information. Notwithstanding any prohibition against disclosure set forth in this rule or elsewhere, the

commission may disclose the substance of information concerning attorney or judicial misconduct to:

(1) the Judicial Tenure Commission,

(2) the Sate Bar of Michigan Client Security Fund,

(3) the Sate Bar of Michigan Committee on Judicial Qualification,

(4) any court-authorized attorney disciplinary or admissions agency, or

(5) other persons who are expressly authorized by the board or the Supreme Court.

(F) Summary of Disclosures. The board shall include in its annual report to the Supreme Court an accounting of all requests for disclosure that have been filed with the board pursuant to subrules (D)(7) and (E)(5). The accounting shall include the board's disposition of each request.

RULE 9.127 ENFORCEMENT

(A) Interim Suspension. The Supreme Court, the board, or a hearing panel may order the interim suspension of a respondent who fails to comply with its lawful order. The suspension shall remain in effect until the respondent complies with the order or no longer has the power to comply. If the respondent is ultimately disciplined, the respondent shall not receive credit against the disciplinary suspension or disbarment for any time of suspension under this rule. All orders of hearing panels under this rule shall be reviewable immediately under MCR 9.118. All orders of the board under this rule shall be appealable immediately under MCR 9.122. The reviewing authority may issue a stay pending review or appeal.

(B) Contempt. The administrator may enforce a discipline order or an order granting or denying reinstatement by proceeding against a respondent for contempt of court. The proceeding must conform to MCR 3.606. The petition must be filed by the administrator in the circuit court in the county in which the alleged contempt took place, or in which the respondent resides, or has or had an office. Enforcement proceedings under this rule do not bar the imposition of additional discipline upon the basis of the same noncompliance with the discipline order.

RULE 9.128 COSTS

(A) Suspension for Nonpayment of Costs. Within 14 days of the conclusion of a hearing before a panel, the grievance administrator shall file with the board an itemized statement of the commission's expenses allocable to the hearing. Copies shall be served upon the respondent and the panel. An itemized statement of the expenses of the board, commission, and panel allocable to a hearing must be made a part of the report in all matters of discipline and reinstatement. The hearing panel and the board in an order for discipline or an order granting or denying reinstatement must direct the attorney to reimburse the State Bar of Michigan for the expenses of that hearing, review, and appeal, if any. Reimbursement must be a condition in a reinstatement order. If the respondent fails to reimburse the State Bar of Michigan for the expenses within the time prescribed, a certified report of the nonpayment must be filed with the Supreme Court, and the State Bar of Michigan, and a copy served upon the respondent. The respondent will be suspended automatically, effective 7 days from the mailing of the certified report, and until the respondent pays the costs or the board approves a suitable plan for payment. An attorney who is suspended for nonpayment of costs under this rule is required to comply with the requirements imposed by MCR 9.119 on suspended attorneys. Commencing on the date a certified report of

nonpayment is filed, interest on the unpaid expenses shall accrue thereafter at the rates applicable to civil judgments.

(B) Reinstatement. A respondent suspended under this rule who later satisfies the reimbursement obligation, and is otherwise eligible, may apply for automatic reinstatement pursuant to MCR 9.123(A) even if the suspension under this rule exceeded 179 days. However, an attorney who is suspended under this rule and who, as a result, does not practice law in Michigan for three years or more, must be recertified by the Board of Law Examiners before the attorney may be reinstated.

RULE 9.129 EXPENSES; REIMBURSEMENT

The state bar must reimburse each investigator, legal counsel, hearing panel member, board member, and commission member for the actual and necessary expenses the board, commission, or administrator certifies as incurred as a result of these rules.

RULE 9.130 MCR 8.122 CASES; ARBITRATION; DISCIPLINE; FILING COMPLAINT BY ADMINISTRATOR

(A) Proceedings. A proceeding on alleged misconduct to which MCR 8.122 is applicable is the same as for a request for investigation. No investigation may be made on a claim by an attorney against a client.

(B) Arbitration. On written agreement between an attorney and his or her client, the administrator or an attorney the administrator assigns may arbitrate a dispute and enter an award in accordance with the arbitration laws. The award and a motion for entry of an order or judgment must be filed in the court having jurisdiction under MCR 8.122. If the award recommends discipline of the attorney, it must

also be treated as a request for investigation.

(C) Complaint. If the administrator finds that the filing of a complaint in the appropriate court under MCR 8.122 will be a hardship to the client and that the client may have a meritorious claim, the administrator shall file the complaint on behalf of the client and prosecute it to completion without cost to the client.

RULE 9.131 INVESTIGATION OF MEMBER OR EMPLOYEE OF BOARD OR COMMISSION; INVESTIGATION OF ATTORNEY REPRESENTING RESPONDENT OR WITNESS

(A) Commission Member or Employee. If the request is for investigation of an attorney who is a member or employee of the commission, the following provisions apply:

(1) The administrator shall serve a copy of the request for investigation on the respondent by ordinary mail. Within 21 days after service, the respondent shall file with the administrator an answer to the request for investigation conforming to MCR 9.113. The administrator shall send a copy of the answer to the person who filed the request for investigation.

(2) After the answer is filed or the time for answer has expired, the administrator shall send copies of the request for investigation and the answer to the Supreme Court clerk.

(3) The Supreme Court shall review the request for investigation and the answer and shall either dismiss the request for investigation or appoint volunteer legal counsel to investigate the matter.

(4) If, after conducting the investigation, appointed counsel determines that the request for investigation does not warrant

the filing of a formal complaint, he or she shall file a report setting out the reasons for that conclusion with the administrator, who shall send a copy of the report to the Supreme Court clerk, the respondent and the person who filed the request for investigation. Review of a decision not to file a formal complaint is limited to a proceeding under MCR 9.122(A)(2). If appointed counsel determines not to file a complaint, the administrator shall close and maintain the file. MCR 9.126(A) governs the release of information regarding the investigation.

(5) If, after conducting the investigation, appointed counsel determines that the request for investigation warrants the filing of a formal complaint, he or she shall prepare and file a complaint with the board under MCR 9.115(B).

(6) Further proceedings are as in other cases except that the complaint will be prosecuted by appointed counsel rather than by the administrator.

If the request is for investigation of the administrator, the term "administrator" in this rule means a member of the commission or some other employee of the commission designated by the chairperson.

(B) Board Member or Employee. Before the filing of a formal complaint, the procedures regarding a request for investigation of a member or employee of the board are the same as in other cases. Thereafter, the following provisions apply:

(1) The administrator shall file the formal complaint with the board and send a copy to the Supreme Court clerk.

(2) The Chief Justice shall appoint a hearing panel and may appoint a master to conduct the hearing. The hearing procedure is as provided in MCR 9.115 or 9.117, as is appropriate, except that no matters shall be submitted to the

board. Procedural matters ordinarily within the authority of the board shall be decided by the hearing panel, except that a motion to disqualify a member of the panel shall be decided by the Chief Justice.

(3) The order of the hearing panel is effective 21 days after it is filed and served as required by MCR 9.115(J), and shall be treated as a final order of the board. The administrator shall send a copy of the order to the Supreme Court clerk.

(4) MCR 9.118 does not apply. Review of the hearing panel decision is by the Supreme Court as provided by MCR 9.122.

(C) Attorney Representing a Respondent or Witness in Proceedings Before Board or Commission. If the request is for an investigation of an attorney for alleged misconduct committed during the course of that attorney's representation of a respondent or a witness in proceedings before the board or the commission, the procedures in subrule (A) shall be followed. A request for investigation that alleges misconduct of this type may be filed only by the chairperson of the commission, and only if the commission passes a resolution authorizing the filing by the chairperson.

Michigan Supreme Court
Lansing, Michigan

Order
Entered: November 7, 1995

James H. Brickley
Chief Justice
Charles L. Levin
Michael F. Cavanagh
Patricia J. Boyle
Dorothy Comstock Riley
Conrad L. Mallett, Jr.
Elizabeth A. Weaver
Justices

In the matter of Reinstatement
of **EVAN H. CALLANAN, JR.**

EVAN H. CALLANAN, JR.,
Petitioner- Appellee,

v

GRIEVANCE ADMINISTRATOR, SC 101137
Appellant. ADB 92-324-RP

On order of the Court, the application for leave to appeal is considered and, pursuant to MCR 7.302(F)(1), in lieu of granting leave to appeal, we REMAND this matter to the Attorney Discipline Board for reconsideration in light of this Court's decision in In re Petition for Reinstatement of Robert McWhorter, 449 Mich 130 (1995).

We do not retain jurisdiction.

Mallett, Jr. and Weaver, JJ., would grant leave to appeal.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

_____, 199_ _____

(3)

Supreme Court, U.S.
FILED
FEB 9 1996
CLERK

NO. 95-982

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1995

ROBERT A. MCWHORTER,

Petitioner,

v.

GRIEVANCE ADMINISTRATOR,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF MICHIGAN

RESPONSE TO BRIEF IN OPPOSITION

Robert A. McWhorter
pro se
4611 W. Main St.
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(616) 382-2287

41 pp

TABLE OF CONTENTS

Statement of the Case 1

Reasons for Granting the Writ 2

Ex Post Facto 2
Double Jeopardy 4
Due Process 5
Equal Protection 8

Conclusion 10

TABLE OF CONTENTS - APPENDIX

In the Matter of Callanan, 440 Mich 1207;
487 NW2d 750 (1992)
Michigan Supreme Court Order
Entered August 7, 1992 . . . . . 1a

In the Matter of Callanan, __Mich__;__NW2d__(1995)
Michigan Supreme Court Order
Entered November 7, 1995 . . . . . 7a

Attorney Discipline Board Attorney Grievance
Commission's Supplemental Brief Following
the Michigan Supreme Court Order of Remand . . . 9a

INDEX OF AUTHORITIES

Cases

City of Detroit v Judge of Recorders Court, 255 Mich 44; 237 NW 40 (1931) 6

Clark v Jeter, 486 US 456, 100 S. Ct. 1910, 100 L. Ed. 2d 465 (1988) 10

Dobbert v Florida, 432 US 282; 53 L. Ed. 2d 344, 97 St. Ct. 2290 (1977) 2,3

Galvin v Press, 347 US 522, 530, 74 S. Ct. 737, 742, 98 L. Ed 911 (1954) 5

Grievance Administrator v August, 438 Mich 296, 475 NW2d 256 (1991) 7, 9

Harrison v Nelson, 394 U.S. 286, 89 S. Ct. 1082, 22 L. Ed. 2d 281 (1969) 6

Hertz v Woodman, 218 US 205, 30 S. Ct. 621, 54 L. Ed. 1001 (1909) 2

In Re Ruffalo, 390 US 544, 88 S.Ct. 1222, 20 L. Ed. 2d 117, (1968) 2,3

Lehr v Robertson, 486 US 248, 103 S. Ct. 2985, 77 L. Ed. 2d 614 (1983) 10

Masonite Corp. v Martin, 314 Mich 411, 22 NW2d 757 (1946) 8

Miller v Florida, 482 US 423, 107 S. Ct. 2446,
96 L. Ed. 2d 351 (1987) 2,3

Nordlingler v Hahn, __ US __, 112 S. Ct. 2326,
120 L. Ed. 2d 1 (1992) 10

Razatos v Colorado Supreme Court, 742 F. 2d 1492,
(10th Circ. 1984), cert den 471 US 1016,
105 S. Ct. 2019, 85 L. Ed. 2d 301 (1985) 3

Rio Grand Irrigation & C. Co. v Guildersleeve, 174 US 603,
19 S. Ct. 761, 43 L. Ed. 1103 (1898) 5

Steward v Poole, 196 Mich App 26; 492 NW2d 475
(1992) 6

The Matter of Callanan, 440 Mich 1207;
487 NW2d 750 (1992) 10

U.S. v Halper, 490 US 435; 109 S. Ct. 1892,
104 L. Ed. 2d 487 (1989) 5

Michigan Constitution

Art VI, §28, Mich. Const., 1963 1

Court Rules

MCR 9.123 8
MCR 9.123(B)(2) 4, 5
MCR 9.123(D)(3) 4, 5, 6, 7
MCR 9.124 3

Statutes

MCL 337.41-47 8

STATEMENT OF THE CASE

There are material misrepresentations and contradictions in Respondent's Brief. The Michigan Supreme Court did not deny reinstatement to Petitioner, although that is the effect of the court's decision. It found Petitioner to be ineligible to reapply for reinstatement because five years had not elapsed from the termination of Petitioner's parole status to the time of his application.

This case involves the constitutional propriety of non-equity results based decisions. Justice Cavanagh, in his concurring opinion, acknowledges that the court adopted the five year, post penal supervision, waiting rule because the court disagreed with the decision of the Attorney Discipline Board. In other words, the court, contrary to its own state constitution, Art VI, §28, Mich. Const. 1963, conducted a de novo review in violation of the due process clause of the 14th Amendment.

The court did not base its decision on the nature of the offense. The court held that all persons seeking reinstatement to the practice of law, placed on penal supervision, must wait five years after the termination of that supervision before they are eligible to seek reinstatement. Implicitly, the court held that in reinstatement cases, it would exercise de novo review, irrespective of the Michigan Constitution, and, regardless of court rule, statute or constitution, permanently disbar a given reinstatement applicant, the facts not withstanding, if it so chose.

The five year, post parole, waiting requirement did not exist prior to July 5, 1995, and could not be construed to exist from a reasonable interpretation of existing court rules. Grievance Administrator admits that the purpose of the decision was "to prevent Petitioner's immediate reapplication in the present case...". (Res. Brf. p. 11)

REASONS FOR GRANTING THE WRIT

In Hertz v Woodman, 218 US 205, 30 S. Ct. 621, 54 L. Ed. 1001 (1909), this Court noted the need to promote certainty, stability and predictability of law. Results based decisions impair predictability and destabilize the law. Results based decisions are arbitrary and capricious and tend to corrupt the law. That risk is magnified when the court and the prosecutor are employer/employee; it is realized when the court and the prosecutor, in this intertwined relationship, impose retroactive rules changes, as in the instant case.

Ex Post Facto

Respondent argues that: "The decision of the Michigan Supreme Court simply presents a procedural change, and is thus not ex post facto."(Res. Brf. p.15) This is not true. The change was substantive and the procedure has not changed. The five year post termination of penal supervision rule did not exist in 1981 when Petitioner's license was revoked. It did not exist when Petitioner applied for reinstatement in April, 1992. It did not exist when Petitioner went through five separate public hearings and appeal to the Attorney Discipline Board, at substantial cost of time and funds. The new eligibility fiat did not exist prior to it retroactive application on July 5, 1995.

Respondent's reliance on Miller v Florida, 482 US 423, 107 S. Ct. 2446, 96 L. Ed. 2d 351 (1987), and Dobbert v Florida, 432 US 282; 53 L. Ed. 2d 344, 97 St. Ct. 2290 (1977) is misplaced. The rule change in the instant case is more analogous to the sentencing change in Miller than as to who may make the final judgment in Dobbert.

This Court in In Re Ruffalo, 390 US 544, 88 S.Ct. 1222, 20 L. Ed. 2d 117, (1968) stated "disbarment...is a

punishment or penalty imposed upon the lawyer" and "quasi criminal in nature." In 1985, this Court reaffirmed its holding in Ruffalo, when it denied certiorari in Razatos v Colorado Supreme Court, 742 F. 2d 1492, (10th Circ. 1984), cert den 471 US 1016, 105 S. Ct. 2019, 85 L. Ed. 2d 301 (1985). The Razatos court also concluded that disbarment proceedings were "quasi criminal in nature."

In Miller, this Court identified a two pronged test to determine whether a particular action is ex post facto: (1) the law or rule must be retroactively applied; and (2) it must disadvantage the offender affected by it. Both are true in this case. "A law is retrospective if it 'changes the legal consequences of the acts contemplated before its effective date.'" Miller at 430, 107 S. Ct. 630. Dobbert at 294, notes that it is "axiomatic that for a law to be ex post facto it must be more onerous than the prior law." Clearly, the new rule is more onerous and ex post facto.

Double Jeopardy

Grievance Administrator states that "Petitioner has always been subject to reinstatement criteria that would require him to establish by clear and convincing evidence that he is fit to resume the practice of law." (Res. Brf. p. 17) This argument is beside the point as the hearing panel and Attorney Discipline Board held that Petitioner met that standard. Petitioner met the standard that has been applied to every other lawyer seeking reinstatement in the State of Michigan since the adoption of the bifurcated system in 1978 but was declared, retroactively, ineligible to apply.

In order to deny reinstatement to this particular Petitioner, the court created the legal fiction that the hearing panel of three lawyers and the Attorney Discipline Board, consisting of distinguished lawyers, such as George E.

Bushnell, Jr., past president State Bar of Michigan and American Bar Association, and distinguished laymen, such as Linda Hotchkiss, M.D., were incapable of making a factual determination of whether Petitioner could safely be recommended as a person fit to practice law or whether he had a proper understanding and attitude toward the standards that are imposed upon members of the Bar.[1] Such legal fiction is absurd. Judges and juries make these types of decisions every day.

On March 1, 1994, the supreme court adopted MCR 9.123(D)(3) that provides that an attorney who has been denied reinstatement may reapply "180 days from the effective date of the most recent hearing panel order granting or denying reinstatement." As additional punishment, the court concluded that the three year period after the termination of Petitioner's parole could not be considered in evaluating Petitioner's fitness to practice law because Petitioner was under "scrutiny" while Respondent appealed and therefore Petitioner must wait until June 27, 1997, to reapply.[2] Both MCR 9.123(B)(2) and MCR 9.123(D)(3) were denied application to Petitioner.

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[1] In this case, the Attorney Discipline Board considered whether supervision had materially affected Petitioner's conduct as it pertained to his reinstatement, remanded the issue for special hearing and concluded that the extent of his supervision was so minimal as to be irrelevant. The supreme court factually overruled the Board stating it was not the extent but the fact of supervision that denied eligibility for reinstatement.

[2] Respondent orally argued to the supreme court that if Petitioner were merely denied reinstatement, under MCR 9.123(D) Petitioner could immediately reapply for reinstatement. As punishment, to prevent Petitioner's reapplication, he was arbitrarily excepted from the court rule and, effectively required to wait 1,541 days to reapply instead of 180 days.

The retroactive application of these civil sanctions can not "fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes" and are "punishment, as we have come to understand the term." U.S. v Halper 490 US 435; 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989). This decision is based not on the offense but on the form of punishment and violates the double jeopardy clause.

Due Process

All of the foregoing facts and reasons regarding ex post facto and double jeopardy amount to denial of due process as well. After Petitioner had met all the criteria for reinstatement, by clear and convincing evidence, by public hearing before a hearing panel of licensed attorneys, and the decision to reinstate affirmed on appeal by the Attorney Discipline Board, the Michigan Supreme Court changed the rules and declared that Petitioner was ineligible to apply for reinstatement in the first instance. This defies the legal "sense of fair play" mandated by this Court and the Constitution. Galvin v Press, 347 US 522, 530, 74 S. Ct. 737, 742, 98 L. Ed. 911 (1954).

Grievance Administrator states that there is a question "as to what process is due". (Res. Brf. p.18) The language of MCR 9.123(B)(2) has been in effect since 1978. Every court and every hearing panel has interpreted the rule to mean that a lawyer whose license to practice has been revoked may apply for reinstatement five years after the date of his or her revocation. In Rio Grand Irrigation & C. Co. v Guildersleeve, 174 US 603, 19 S. Ct. 761, 43 L. Ed. 1103 (1898).

> **A duly authorized rule of court has the force of law, and is binding upon the court**

> **as well as upon the parties to an action, and cannot be dispensed with to suit the circumstances of any particular case .. but once made without qualification, it must be applied in all cases which come within it, until it is repealed by the authority which made it."**

In Harrison v Nelson, 394 U.S. 286, 89 S. Ct. 1082, 22 L. Ed. 2d 281 (1969) this Court stated:

> **We have no power to rewrite the Rules by judicial interpretations. We have no power to decide that Rule 33 applies to habeas corpus proceedings unless, on conventional principles of statutory construction, we can properly conclude that the literal language or the intended effect of the Rules indicates that this was within the purpose of the draftsmen or the congressional understanding.** (Emphasis added)

Similar conclusions have been reached by the Michigan courts. In Hill v Webber, 50 Mich 142, 15 NW 52 (1883) it was held that a party is entitled to insist upon strict compliance with court rules and in City of Detroit v Judge of Recorders Court, 255 Mich 44; 237 NW 40 (1931) it was stated that a court "ought not to depart from established practice suddenly and without notice and to injury of litigants". In Steward v Poole, 196 Mich App 26; 492 NW2d 475 (1992) the court stated that the interpretation of a court rule is subject to those principles governing statutory construction and the court rule should be construed in accordance with the ordinary and approved usage of the

language.

In the instant case, the court violated all of these principles. Compliance with these principles is the process due Petitioner.

Respondent repeatedly states that the new five year post parole requirement is to "ensure that any decision as to whether an applicant for reinstatement has been truly rehabilitated is based on a proper foundation." Respondent could not cite, if required, more than one or two instances in the history of the practice of law in Michigan, where a disbarred lawyer was reinstated and thereafter was subsequently suspended or revoked for new misconduct.

Actually, the court's decision goes beyond the five year post parole requirement. MCR 9.123 and Grievance Administrator v August, 438 Mich 296, 475 NW2d 256 (1991) make clear that there is no permanent disbarment in Michigan. Contrary to MCR 9.123 and August, the language of this decision develops a form of selective permanent disbarment.

Justice Brickley wrote that "even though a period of time has elapsed since Petitioner was under the supervision parole authorities, he has been involved in his petition for reinstatement since his release from parole." Therefore, because Petitioner was applying for his license, post parole time could not be considered because Petitioner was under "similar, if not heightened scrutiny..." Justice Weaver noted that **"Petitioner will remain under our scrutiny and will probably attempt to conform his conduct to our standard until he reaches his goal of readmittance"** and therefore, the five year rule is illogical. According to Judge Weaver, Petitioner can never establish the qualifications to be readmitted. This reasoning cannot be extrapolated from the

language of MCR 9.123. This reasoning is clearly a rewriting of the rules, after the fact, by judicial interpretation and violates due process.

The court, contrary to Respondent, did not address the evidence submitted to the hearing panel or the Attorney Discipline Board. Neither Respondent nor the court contested the hearing panel and Attorney Discipline Board's findings regarding Petitioner's establishment of the reinstatement criteria. The court found lack of eligibility to reapply.

Respondent states that MCL 338.41-338.47 "pertains only to those occupations and professions regulated by the executive branch of government." Respondent cites no authority for this proposition. The practice of law is a profession. The statutes speak for themselves and the court rules must be read in light of the statute. Masonite Corp. v Martin, 314 Mich 411, 22 NW2d 757 (1946). The due process mandated by the 14th Amendment has been denied.

Equal Protection

Respondent claims that the only difference between Petitioner and other disbarred attorneys is that the Supreme Court's holding provides a method for determining whether Petitioner has spent adequate "unsupervised" time to enable a proper evaluation of his rehabilitation and that "such a distinction has a rational basis." (Res. Brf. p.21) This statement is absolutely untrue. There is no "method" stated for determining the amount of "unsupervised time to evaluate rehabilitation" and no other lawyer seeking reinstatement has been subject to this "method."

By silence, Respondent admits that a hundred or more Michigan lawyers, were similarly situated to Petition between 1986 and 1995. All of these lawyers had their licenses suspended or revoked for criminal or gross misconduct,

many of whom were placed on some form of penal supervision. Respondent further admits that none of these "similarly situated" attorneys was denied reinstatement because of his supervision status or required to wait five years from the termination of such supervision to apply for reinstatement.[3]

There is no rational basis for distinguishing Petitioner from the hundred or more other attorneys, no rational basis for the retroactive application of this "new rule", and no rational basis nor legitimate state interest furthered by utilizing the punishment inflicted on a given disbarred attorney as opposed to the nature of the offense to determine fitness to practice law.

In August, the court focused on the offense to determine fitness to practice:

> Obviously, the question whether an attorney may be safely recommended to the public is a different inquiry in the case of an attorney disbarred for corrupting the administration of law than in the case of an attorney whose disbarment resulted from conduct unrelated to the practice of law. (438 Mich at 310)

Petitioner's convictions were unrelated to the practice of law and the court, to avoid reinstatement, changed the focus.

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[3] i.e. Attorneys James DeVries, ADB File 90-106 RP and Joseph Jerkins, ADB File 91-61 RP, both from Petitioner's home town, were charged with money laundering and participation in large scale drug operations. Both were sentenced to prison with additional supervised release of at least two (2) years. Both negotiated sentence reductions and suspension of license instead of revocation in exchange for cooperation. Within six months of the termination of their supervised releases, both were reinstated to the practice of law and Respondent did not appeal.

The distinction between Petitioner and the other attorneys similarly situated, is non-existent. The concept of equal justice under the law requires the state to govern impartially and it may not draw distinctions between individuals solely on differences that are irrelevant. Lehr v Robertson, 486 US 248, 103 S. Ct. 2985, 77 L. Ed. 2d 614 (1983). Equal protection keeps governmental decision makers from treating differently persons who are in all relevant aspects alike. Nordlingler v Hahn, __ US __, 112 S. Ct. 2326, 120 L. Ed. 2d 1 (1992).

To withstand intermediate scrutiny under equal protection, the classification must be substantially related to an important governmental objective. Clark v Jeter, 486 US 456, 100 S. Ct. 1910, 100 L. Ed. 2d 465 (1988). The extent of Petitioner's rehabilitation is not in question and retroactive application of the new rule has no "important governmental objective."

The instant case is, allegedly, based in part on The Matter of Callanan, 440 Mich 1207; 487 NW2d 750 (1992). This decision was a preemptory reversal order without consideration of the merits. There was an issue in that case as to whether his parole had terminated. Immediately after the preemptory order, Callanan reapplied, was reinstated and has practiced for two years. Respondent now argues in Callanan that he should have his license revoked because of the court's decision in this case. (1a-23a) This is the circuitous reasoning being utilized by the court to deny equal protection.

CONCLUSION

Petitioner prays that a Writ of Certiorari be granted.

Dated: 2/9/96 Robert A McWhorter

Robert A. McWhorter, Petitioner

Michigan Supreme Court
Lansing, Michigan

Order
Entered: August 7, 1992
Michael F. Cavanagh
Chief Justice

Charles L. Levin
James H. Brickley
Patricia J. Boyle
Dorothy Comstock Riley
Robert P. Griffin
Conrad L. Mallett, Jr.
Justices

In the Matter of Reinstatement
of **EVAN H. CALLANAN, JR.**

EVAN H. CALLANAN, JR.
Petitioner-Appellee,

v

GRIEVANCE ADMISTRATOR,
Appellant.

No. 93833

On order of the Court, the application for leave to appeal is considered and, pursuant to MCR 7.302(F)(1) in lieu of granting leave to appeal, we REVERSE the order of the Attorney Discipline Board, and ORDER that the petitioner not be reinstated at this time. The misconduct that led to the revocation of the petitioner's license to practice law was substantial and, because the petitioner had spent little or no time outside the supervision of federal authorities since his license was revoked, it was not possible for the

hearing panel and the Attorney Discipline Board to determine the present fitness of the applicant for readmission. MCR 9.123(B)(6) and (7). In light of this order, the stay entered by this Court on July 16, 1992 is VACATED as no longer necessary.

LEVIN, Justice, states as follows:

I would deny or grant leave to appeal. I adhere to the view that peremptory reversal should be reserved for cases in which the law is settled and no factual assessment is required.[1] In the instant case, as indicated in the peremptory order, factual and legal assessment is not appropriate. Further, this Court's peremptory disposition does not comply with the requirements of Const. 1963, art. 6, §6, which requires that "[d]ecisions of the supreme court, including all decisions on prerogative writs, shall be in writing and shall contain a concise statement of the facts and reasons for each decision...."

The order of peremptory reversal of the Attorney Discipline Board does not contain an adequate statement of facts or reasons for decision.

The Hearing Panel of the Attorney Discipline Board ordered that Evan H. Callanan, Jr., be reinstated subject to certain conditions. The Grievance Administrator filed a petition for review with the Attorney Discipline Board, the board conducted a hearing, and remanded to the hearing panel with instructions to file a supplement referring to the standards and criteria approved by this Court in Grievance Administrator v August, 438 Mich 296, 475 NW2d 256 (1991).

The hearing panel concluded, for reasons stated in its supplemental report, that Callanan desired in good faith to be restored to the privilege of practicing law, that five years had

elapsed since revocation of his license, that he had not practiced or attempted to practice law contrary to the requirements of the revocation, and that he had fully complied with the order of discipline. The supplemental report continued:

> "5. From the testimony of the witnesses it appears that the Petitioner is held in high esteem in his community and his church in spite of the fact that the minister and the members of the congregations are aware of his prior criminal conviction and time in prison. The testimony further related that he is well received and respected by all persons in his community. Further testimony reflected that members of the church would hold the Petitioner in a position of trust, further seeking his services were he to be returned to the practice of law.
>
> "Testimony of the Petitioner reflected that he is aware of the gravity of his offense and is very eager to be reinstated to the practice of law. It appears that there has been no controversy in the operation of the motel business in which the Petitionier has been engaged and, therefore, this Panel has concluded that the Petitioner's conduct since the order of discipline has been exemplary and above reproach.
>
> "6. From the testimony of the Petitioner, as well as attorney Robert E. Sage, the Panel concluded the Petitioner has the proper understanding of and attitude toward to standards that are imposed on members of the bar and that he will conduct himself in conformity with those standards.
>
> "7. The Hearing Panel considered the length of time the Petitioner has been suspencded and the severity of

> the offense for which he was suspended and have concluded that he can be safely recommended to the public, the courts and the legal profession as a person fit to be consulted by others and to represent them and otherwise act in matters of trust and confidence and in general to aid in the administration of justice as a member of the bar and as an officer of the court."

The Attorney Discipline Board considered the supplemental report together with further objections filed by the Grievance Administrator. The board, in a decision in which all members of the board joined, stated that it was persuaded the hearing panel's findings and conclusions had appropriate evidentiary support in the record, and the order of reinstatement should be affirmed subject to the terms and conditions contained in the panel's order, and the further conditions set forth in the board's order, which included that Callanan provide evidence that he had been discharged from parole. It appears that Callanan's parole began no later than his release from a halfway house in November, 1988. almost four years ago-it does not readily appear when his parole actually terminated.

The statement in this Court's order that the misconduct that led to the revocation of Callanan's license to practice law was substantial, and, because he had spent little or no time outside the supervision of federal authorities since his license was revoked, it was not possible for the hearing panel or the Attorney Discipline Board to determine his present fitness for readmission, provides little or no guidance to Callanan, the public, the profession, hearing panels, and the Attorney Discipline Board concerning what might constitute an appropriate period of time in light of the seriousness of the

misconduct.

[1] People v Wright 439 Mich 910, 910-911, 479 NW2d 631 (1992) Levin, J. dissenting); Roek v Chippewa Valley Bd. of Ed., 430 Mich 314, 322, 422 NW2d 680 1988) (Levin, J., separate opinion); Grames v Amerisure Ins. Co., 434 Mich 867, 868-875, 451 NW2d 304 (1990) (Levin, J. dissenting); People v Little, 434 Mich 752, 769-770, 456 NW2d 237 (1990) (Levin, J. dissenting); People v Wrenn, 434 Mich 885, 885-886, 452 NW2d 469 (1990) (Levin, J., dissenting);Harkins v Northwest Activity Ctr., Inc., 434 Mich 896, 899, 453 NW2d 677 (1990) (Levin, J., dissenting); Dep't. of Social Services v American Commercial Liability Ins. Co., 435 Mich 508, 515, 460 NW2d 194 (1990)(Levin, J., separate opinion); Yahr v Garcia, 436 Mich 872, 461 NW2d 363 (1990)(Levin, J. dissenting);Universal Underwriters Ins. Co. v Vallejo, 436 Mich 873, 873-874, 461 NW2d 364 (1990)(Levin, J. dissenting); People v Stephens, 437 Mich 903, 903-910, 465 NW2d 561 (1991) (Levin, J. dissenting); People v Berkey, 437 Mich 40, 54, 467 NW2d 6 (1991)(Levin, J. dissenting); Turner v Washtenaw Co. Rd. Comm., 437 Mich 35, 38-39, 467 NW2d 4 (1991)(Levin, J. separate opinion); Lepior v Venice Twp., 437 Mich 955, 956-966, 467 NW2d 811 (1991)(Levin, J. dissenting); City of Rochester Hills v Southeastern Oakland County Resource Recovery Authority, 440 Mich ___, 486 NW2d 678 (1992)(Levin, J. dissenting).

See Schweiker v Hansen, 450 US 785, 791, 101 S. Ct. 1468, 1472, 67 L. Ed. 2d 685 (1981) (Marshall, J., dissenting)("A summary reversal is a rare disposition usually reserved by this Court for situations in which the law is settled and stable, the facts are not in dispute, and the

decision below is clearly in error"); Leis v Flynt, 439 US 438, 457-458, 99 S. Ct. 698, 708-709, 58 L. Ed. 2d 717 (1979) (Stevens, J. , dissenting)("Summary reversal 'should be reserved for palpably clear cases of ...error' Eaton v Tulsa, 415 US 697, 707, 94 S. Ct. 1228, 1234, 39 L. Ed. 2d 693 [1974][Rehnquist, J., dissenting]").

Michigan Supreme Court
Lansing, Michigan

Order
Entered: November 7, 1995

James H. Brickley
Chief Justice
Charles L. Levin
Michael F. Cavanagh
Patricia J. Boyle
Dorothy Comstock Riley
Conrad L. Mallett, Jr.
Elizabeth A. Weaver
Justices

In the Matter of Reinstatement
of **EVAN H. CALLANAN, JR.**

EVAN H. CALLANAN, JR.
Petitioner-Appellee,

v

GRIEVANCE ADMISTRATOR,
Appellant.

SC 101137
ADB 92-324-RP

On order of the Court, the application for leave to appeal is considered and , pursuant to MCR 7.302(F)(1) in lieu of granting leave to appeal, we REMAND this matter to the Attorney Discipline Board for reconsideration in light of this Court's decision in In re Petition for Reinstatement of Robert McWhorter, 449 Mich 130 (1995).

We do not retain jurisdiction.

Mallett, JR. and Weaver, JJ., would grant leave to appeal.

I, **CORBIN R. DAVIS**, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

_____, 199_ _____

STATE OF MICHIGAN
ATTORNEY DISCIPLINE BOARD

In the Matter of the Petition for
Reinstatement of EVAN H. CALLANAN, JR.
ADB Case No. 92-324-RP

Petitioner.

/

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/

PHILIP J. THOMAS (P-31298)
GRIEVANCE ADMINISTRATOR
Attorney Grievance Commission

By: Richard L. Cunningham (P29735)
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/

ATTORNEY GRIEVANCE COMMISSION'S SUPPLEMENTAL BRIEF FOLLOWING THE MICHIGAN SUPREME COURT ORDER OF REMAND

NOW COMES Richard L. Cunningham, Associate Counsel, Attorney Grievance Commission, and, pursuant to the Order entered by the Attorney Discipline Board on November 20, 1995, here provides its brief on the

applicability of the Michigan Supreme Court's decision in In re Petition for Reinstatement of Robert McWhorter, 449 Mich 130, (1995), to the present case.

Statement of Relevant Facts

Petitioner Evan H. Callanan, Jr. was tried before a jury in the U.S. District Court for the Eastern District of Michigan, and on September 1, 1983 was convicted of felony offenses including conspiracy to violate RICO, substantive violations of RICO, three counts of mail fraud, obstructing a criminal investigation, and making false declarations before a grand jury. The charges arose from evidence of Petitioner's involvement in a scheme in which a Michigan judge received improper kickbacks in exchange for judicial favors, and from Petitioner's attempts to cover-up such illegal activity.

Petitioner received concurrent sentences of eight years on each of the RICO charges and five years on the other counts. The court allowed petitioner to remain free on bond while he pursued an appeal, but he was suspended from the practice of law pursuant to MCR 9.120(A)(2). Petitioner's license to practice law was automatically suspended effective the date of the jury verdict, and the interim suspension remained in effect while he appealed his criminal convictions.

In November 1985 the U.S. Sixth Circuit Court of Appeals affirmed all Petitioner's convictions, specifically finding that the evidence was sufficient to sustain the convictions for conspiracy to violate RICO and the substantive violations of RICO. United States v Oaoud, 777 F2d 1105, (6th Cir. 1985). Petitioner surrendered to the appropriate authorities on December 2, 1985, and began serving his sentence.

On March 14, 1986 Wayne County Hearing Panel #20 issued an Order of Revocation based upon these felony convictions. The final order of discipline provided that Appellee's license was revoked, nunc pro tunc, effective September 1, 1983.

While Appellee was serving his prison sentence, the United States Supreme Court announced in McNally v United States, 483 U.S. 350, 107 S. Ct. 2875 (1987), that a prosecution under the mail fraud statute could not proceed on an "intangible rights theory". The court held that a defendant could not be punished for a scheme which deprived a person of the intangible right of honest services, as the statute covered only tangible rights such as money and property. Consequently, Petitioner's case came back before the U.S. Sixth Circuit Court of Appeals, and his convictions for mail fraud, and RICO violations premised on certain acts of mail fraud, were vacated. However, the court again affirmed the convictions an five year concurrent sentences for obstruction of a criminal investigation and perjury. Callanan v United States, 881 F2d 229 (6th Cir. 1989).

Petitioner remained incarcerated in federal correctional facilities until November 1988. He was then placed in a half-way house for several months, and was placed on federal parole in early 1989.

On or about August 17, 1990, while Petitioner was still on parole, he filed a petition seeking reinstatement of his license to practice law. The petition came before Attorney Discipline Board Tri-County Hearing Panel #75 under ADB Case No. 90-140-RP, and a hearing was conducted. On May 8, 1991, the hearing panel issued an Order of Reinstatement, directing that Appellee be reinstated to the practice of law. The order conditioned Appellee's reinstatement upon

recertification by the Board of Law Examiners, proof of his discharge from federal parole and payment of costs in the amount of $1,774.53.

The Attorney Grievance Commission appealed this Order of Reinstatement by filing a petition for review under MCR 9.118. In a brief filed on June 21, 1991, the Commission argued that Petitioner failed to establish compliance with MCR 9.123(B) by clear and convincing evidence. The Commission asserted that since Petitioner was only recently released from incarceration, and was still under federal parole supervision, the panel lacked an adequate basis by which to gauge his reformation.

On August 29, 1991, while the appeal on ADB Case No. 90-140-RP was still pending before the Attorney Discipline Board, the Michigan Supreme Court issued its opinion in Grievance Administrator v August, 438 Mich 296. In that case, the court held that the nature of the offense and the time elapsed since its commission and disbarment are relevant and important considerations in determining whether a disbarred attorneys should be recommended to the position of public trust that is held by the members of the bar. The court determined that an attorney may be denied readmission on the grounds that sufficient time has not passed to determine the present fitness of the applicant for readmission.

ADB Case No. 90-140-RP came before the Attorney Discipline Board for oral arguments on September 11, 1991. After hearing arguments, the Board remanded the case to the hearing panel or a supplement report. The Board expressly ordered the panel to consider the standards and criteria for reinstatement expressed in Grievance Administrator v August, supra.

On February 12, 1992, the hearing panel filed a

Supplemental Report, stating that it had reviewed the matter "in camera" and had determined it appropriate to affirm its prior Order of Reinstatement. On April 14, 1992, the Attorney Discipline Board issued an order affirming the hearing panel.

The Attorney Grievance Commission then filed an Application For Leave To Appeal with the Michigan Supreme Court. The Commission requested review of the final orders of the Tri-County Hearing Panel #75 and the Attorney Discipline Board, and asked that the reinstatement order be stayed pending the appeal.

On July 16, 1992, the Supreme Court issued the stay requested by the Attorney Grievance Commission. Since Petitioner had not yet fully met the conditions of reinstatement set by the hearing panel, he was not yet readmitted at the time the stay was issued.

On August 7, 1992, the Michigan Supreme Court issued its Order, under docket number SC 93833, reversing the Attorney Discipline Board and ordering that Petitioner not be reinstated to the practice of law. The court determined that the misconduct which led to the reinstatement was substantial, and since Petitioner had spent little or no time outside the supervision of federal authorities it was not possible to determine his present fitness for readmission. The court did not indicate what period of time outside supervision would be sufficient for a proper evaluation of Petitioner's reformation.

On or about August 26, 1992, Petitioner filed a Petition For Reconsideration with the Supreme Court. On November 24, 1992, the court entered an Order denying the motion for reconsideration.

On December 11, 1992, less than three weeks after

the Supreme Court denied Appellee's motion for reconsideration, Appellee filed a new petition for reinstatement. The new petition was assigned to Tri-County Hearing Panel #29 under the file number 92-324-RP.

The Hearing Panel heard evidence on the petition on May 10, May 24, and June 14, 1993. On October 7, 1993, the panel issued its Order Of Reinstatement and Report. In its report, the panel made the findings that Petitioner was discharged from parole on April 7, 1992, and that he has now spent a substantial period of time outside the supervision of federal authorities.

The Attorney Grievance Commission then filed a Petition for Review with the Attorney Discipline Board, appealing the decision of the hearing panel to reinstate Petitioner to the practice of law. The commission further requested that Petitioner's reinstatement be stayed, pending the appeal.

On November 12, 1993, the Attorney Discipline Board denied the Petition For Stay of Order Of Reinstatement. Petitioner then complied with the condition set forth in the Order Of Reinstatement, and on November 16, 1993, was reinstated to the practice of law.

The appeal by the Attorney Grievance Commission came before the Attorney Discipline Board for oral argument on December 16, 1993. After hearing arguments of counsel, the board took the matter under advisement. On September 29, 1994, the Attorney Discipline Board announced, in a 4 to 3 decision, that the hearing panel Order of Reinstatement was affirmed in all respects. While the Attorney Discipline Board determined that Appellee was actually discharged from federal supervision on November 30, 1990, and that there was a lack of evidentiary support for the hearing panel

finding that such supervision ended on April 7, 1992, it affirmed the panel's conclusion that sufficient time had passed since the end of supervision to make a valid finding as to Appellee's fitness for reinstatement.

On October 19, 1994, the Attorney Grievance Commission filed an Application for Leave To Appeal with the Michigan Supreme Court, therein requesting review of the Hearing Panel and Attorney Discipline Board Orders which reinstated Petitioner to the practice of law.

On July 5, 1995, the Michigan Supreme Court issued its opinion in In re Petition for Reinstatement of Robert A. McWhorter, 449 Mich 130. In that case, the court found that the petitioner had not spent adequate time outside the supervision of parole authorities sufficient to demonstrate that he has a proper understanding of an attitude toward the standards imposed on members of the bar or that he will conduct himself in conformity with those standards. The court held that the petitioner could not reapply for reinstatement until five years after the date of his release from federal parole.

On November 7, 1995, the Michigan Supreme Court entered an Order concerning the application for leave to appeal filed by the attorney Grievance Commission on October 19, 1994 in the present case. In lieu of granting leave, the Supreme Court remanded the matter to the Attorney Discipline Board for reconsideration in light of the Court's decision in McWhorter, supra.

On November 20, 1995, the attorney Discipline Board entered an Order, therein directing the parties to present a brief on the applicability of the McWhorter decision to the present case.

Since receiving the November 20, 1995 Order of the

Attorney Discipline Board the Attorney Grievance Commission has conducted additional investigation on the question as to when Petitioner Evan H. Callanan was released from federal parole. Based upon this supplemental investigation, the Attorney Grievance Commission will accept, and does not challenge, the Board's determination that parole ended on November 30, 1990.

Argument One

Petitioner's Reinstatement To The Practice Of Law Was Premature. There Was Insufficient Time Between The End Of Petitioner's Federal Parole And The Reinstatement Hearing For The Panel To Adequately Evaluate His Eligibility For Reinstatement.

Petitioner Evan H. Callanan, Jr. was released from prison in November 1988, but resided in a half-way house until February 1989. He remained subject to the supervision of parole authorities until November 1990. The current petition for reinstatement was filed in December 1992, less than 25 months after his release from parole. The evidentiary record for the reinstatement hearing was closed on June 14, 1993, less than 31 months after the expiration of the parole period. While Tri-County Hearing Panel #29 concluded that Petitioner had established by clear and convincing evidence his eligibility for reinstatement under the criteria set forth at MCR 9.123(B), there was not sufficient time between his discharge from parole and the presentation of proofs on the issue to make such a finding.

In re Petitioner for Reinstatement of Robert A. McWhorter, 449 Mich 130 (1995), is directly on point. There the court held that the relevant inquiry in a reinstatement proceeding is whether a petitioner has spent enough time outside the supervision of parole authorities in order for a hearing panel to properly evaluate a disbarred

attorney's present ability to comport with the fitness requirements. In making this finding, the court expressly noted that the extent of parol supervision was not determinative, and the critical consideration was the fact that he was on parole.

The court concluded that petitioner McWhorter had not spent enough time away from the authority of parole officers to demonstrate by clear and convincing evidence that he may be safely recommended as a person fit to represent others in matters of trust and confidence. Likewise, the court determined that sufficient time had not passed from his release from parole for him to adequately demonstrate a proper understanding of, and attitude toward, the standards imposed on members of the bar. in deciding that an insufficient time had passed since this petitioner's release from parole, the court announced a general rule concerning the minimum time that must pass before such a petitioner may be permitted to apply for reinstatement. The court set the minimum tome period at five years from the date of termination of parole.

Writing for the court, Chief Justice Brickley announced the five year waiting period, and noted at 449 Mich 142,

> We borrow this time span from CR 9.123 and analogize it to the present case. For the same reasons, five years is the minimum period after which a disbarred attorney may be eligible for reinstatement, we would hold that it is a sufficient period outside the supervision of parole authorities an the contemplation of petition for reinstatement to fully evaluate his fitness to practice law.

While only Justice Mallet joined with the Chief Justice in the court's opinion, the separate concurring opinion of Justice Riley, which was joined by Justice Boyle, makes

it clear that a majority of the Supreme Court accepts the bright line rule of a five year minimum waiting period after termination of parole. Justice Riley's short concurring opinion leaves no doubt that a solid majority of the court finds that a disbarred attorneys should not be permitted to reapply until five years after parole has ended. As she stated at 449 Mich 143-144,

> We agree with Justice Weaver's assessment that this record calls for the permanent disbarment of Mr. McWhorter. However, in the absence of a majority recognizing the proposition that there should be 'permanent' disbarment, with no opportunity ever to reapply, we join in the ruling of the lead opinion imposing a five year waiting period following a period of parole supervision.

The rule requiring a minimum five year waiting period after the end of parole is clearly applicable to the present case. It must be remembered that the Michigan Supreme Court has already reviewed a prior reinstatement petition by Petitioner Callanan, and has determined that it would not be possible for a hearing panel to properly evaluate his eligibility for reinstatement until he has spent a sufficient amount of time outside the authority of parole officials. When the Attorney Grievance Commission challenged the prior order of reinstatement issued in ADB Case 90-140-RP by an application for leave to appeal, the Supreme Court peremptorily reversed the decision of the Attorney Discipline Board and ordered that Petitioner Callanan not be reinstated. In an Order issued on August 7, 1992, under Supreme Court Case No. 93833, the court stated:

> The misconduct that led to the revocation of the petitioner's license to practice law was substantial and, because the petitioner had

spent little or no time outside the supervision of federal authorities since his license was revoked, it was not possible for the hearing panel and the Attorney Discipline Board to determine the present fitness of the applicant for readmission. MCR 9.123(B)(6) and (7).

In its action on Petitioner's prior application for readmission, the Supreme Court made it clear that the serious nature of the misconduct that led to disbarment required a substantial period of time outside the supervision of parole authorities for a proper evaluation of his eligibility for reinstatement, but the court did not indicate what period of time was sufficient. With the decision in McWhorter, it is now seen that any period of time less than five years after the release from parole is always insufficient for a proper evaluation in such cases. Thus the finding of Tri-County Hearing Panel #29, based upon a petition filed less than 25 months after release from parole and testimony taken less than 31 months after discharge, is not adequately supported.

Argument Two

Petitioner Should Be Prohibited From Reapplying For Reinstatement For Another Five Years. Because He has Been Under The Scrutiny Of The Disciplinary System, A Hearing Panel Would Not Yet Be Able To Safely Judge Whether He Has Now Been Rehabilitated.

Petitioner's petition for reinstatement in ADB Case No. 90-140-RP was denied by the Order of the Michigan Supreme Court issued on August 7, 1992. Shortly thereafter, Petitioner requested reconsideration of the denial. On November 24, 1994, the Supreme Court denied the motion for reconsideration. Less than three weeks later, on December 11, 1992, Petitioner filed a new petition for reinstatement. That second petition resulted in the

proceedings that are now under review. Since disciplinary proceedings have been pending continuously since the filing of this second petition, Petitioner has been under the scrutiny of teh disciplinary system since he filed that second petition;

The scrutiny to which a person is subject by pending reinstatement proceedings must be considered similar to the supervision to which a parolee is subject by "non-rigid" overview of the parole authorities. As the court recognized in McWhorter, supra, at 449 Mich 142, N. 16.

> We note that even though a period of time has now elapsed since petitioner was under the supervision of parole authorities, he has been involved in his petition for reinstatement since his release from parole. Therefore, we are equally unable to safely judge whether petitioner has now been rehabilitated - ever though some time has elapsed outside the supervision of parole authorities - because his action have been under similar, if not heightened, scrutiny by the Attorney Grievance Commission, the hearing panel, and the Attorney Discipline Board.

The very essence of the McWhorter decision is that it is not really possible to evaluate whether a person has been truly rehabilitated until he or she was [has] spent substantial time outside the scrutiny or supervision of a person or agency with authority over him or her. Rehabilitation is demonstrated by a review of what a person has done when left on his or her own, not what he or she has done while being watched. Since Petitioner has been under the scrutiny of the disciplinary system while his petition has been pending, it is not possible to get a true picture of his rehabilitation.

It is the actions of a person during the period of time to which he or she is not subject to supervision or scrutiny

that shows whether or not he or she has actually been rehabilitated. In an effort to assist the bar in determining whether sufficient time has passed outside such supervision,t eh court in McWhorter held that a minimum period of five years is always required for a proper evaluation. Even though the circumstances of any individual case may establish that five years outside supervision is not sufficient to make a valid judgment of rehabilitation, no valid decision can be made without an examination of a petitioner's conduct for five years outside supervision or special scrutiny.

In the present case, Petitioner's parole expired on November 30, 1990. Thus the five year period following the end of parole supervision has expired. However, Petitioner was under the scrutiny of the disciplinary system during that period following termination of parole, and has not yet spend any substantial time completely on his own. When the Supreme Court stated by its Order of August 7, 1992 that an insufficient time had passed outside the supervision of federal authorities to adequately determine his fitness to practice, Petitioner chose to almost immediately file a new petition rather than develop a history of actions outside any close scrutiny. In doing so, Petitioner made it impossible for any hearing panel to adequately determine his rehabilitation until at least five years after the resolution of the second petition.

The fact that premature petition for reinstatement, and the resulting special scrutiny of the disciplinary system, must extend the period during which a disbarred attorney is prohibited from seeking reinstatement is implicitly recognized in McWhorter. In imposing the five year period following release from federal parole, the court stated at 449 Mich 142,

> We are persuaded that this addresses the problem identified by one commentator: "The disbarred attorney may file another petition at a later date. In light of this, it would be

> helpful if the rules provided a minimum spacing between subsequent petitions to prevent a lawyer whose petition is denied from immediately filing another petition.

Such language demonstrates the court's disapproval of the filing of a new petition for reinstatement directly on the heels of the denial of a prior petition, and supports the argument that a petitioner must spend sufficient time outside the scrutiny of disciplinary authorities before requesting reinstatement. Respondent should not now be permitted to file a new reinstatement petition simply because the five year period following termination of parole has recently expired. The critical issue is whether sufficient time outside any special scrutiny or supervision has expired to enable a fair evaluation of rehabilitation, not simply whether five years have passed since the end of parole.

By reversing the hearing panel, and denying the petition for reinstatement, the Attorney Discipline Board will end the special scrutiny to which Petitioner has been subject while the disciplinary proceedings have been pending. Petitioner can then get on with his life, and his true character will emerge from his actions during the period when he is on his own. If Petitioner brings a new petition, after awaiting period of at least five years on his own, a hearing panel would have a more realistic basis from which to evaluate his true rehabilitation.

Conclusion

For the reasons herein stated and discussed, the Attorney Discipline Board should reconsider and vacate its September 29, 1994 Order Affirming Hearing Panel Order Of Reinstatement, reverse the Order Of Reinstatement entered by Tri-County Hearing Panel #29, deny the petition for reinstatement, and enter an order prohibiting Petitioner Evan H. Callanan, Jr. from reapplying for reinstatement for at least another five years.

Dated: Detroit, Michigan
December 13, 1995

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